Muhammad Isma Izami bin Jaafar v Konstabel Muhamad Zafran Aiman bin Muhamad Zainol & Ors

HIGH COURT (TAIPING) — CIVIL SUIT NO AB-21NCvC-2–05 OF 2019
NOOR RUWENA JC
3 OCTOBER 2023

Tort — Negligence — Police officers — Whether police officers in patrol car were negligent in relentlessly shooting at fleeing private car throughout their 31km pursuit of it — Whether the officers owed driver of fleeing car duty of care which was breached causing him to suffer physical injuries that were foreseeable — Whether fleeing car had posed no threat to cause the officers to discharge their firearms — Whether the officers had acted unreasonably and recklessly in their overzealous attempt to capture driver of the fleeing car

The plaintiff, who was a general worker in an oil palm estate, brought the instant suit against the defendants for damages primarily for causing him bodily injuries and loss of income as a result of their alleged acts of assault, battery and/or negligence. The plaintiff also sought damages for the defendants' commission of the torts of misfeasance in public office and breach of statutory duty and prayed for a declaration that the defendants had willfully and/or with wrongful intent breached his fundamental rights under Part II of the Federal Constitution. The first and second defendants ('D1' and 'D2'), who were respectively, a police constable and police corporal, were on crime prevention rounds in a police patrol car in the early hours of 10 November 2016, when they spotted a car with heavily-tinted windshields and windows and a missing digit on its number plate being driven in a suspicious manner. They checked with the police computer system and found that the number plate belonged to a motorcycle. The policemen switched on their siren and flashing lights and attempted to overtake the car to get it to stop but the car sped off instead. At the time, the plaintiff was driving the car with his three friends in it. Although the patrol car, through its loudhailer, ordered the plaintiff to stop, he did not do so because he did not have a driving licence or insurance and road tax for the car. During the pursuit, D2 ordered D1 to shoot at the car's tyres. When some of the shots punctured a rear tyre of the car and the vehicle slowed down, D1 and D2 got out of their vehicle to approach the car but it suddenly sped off resulting in a continuation of the chase and another round of bullets being fired at the car by the pursuing policemen. Panicked by the gunshots, the plaintiff never let-up and continued driving until he reached his house where the car came to a halt after smashing into a tree. The entire police chase had covered a 31.3km distance in about 30–40 minutes. All the

A occupants in the car surrendered to the policemen. Shrapnel from the shooting had pierced the plaintiff's head and he underwent surgery to remove most of it from his brain. Some fragments which had entered deep into the brain could not be removed and caused the plaintiff suffer residual brain damage at the left parietal lobe which resulted in general weakness in his right upper and lower B limbs, inability to do simple mathematical calculations and the likelihood of suffering epileptic seizures in future. The car was found to have 14 bullet holes on its body and windshields. The third to the sixth defendants were alleged in the plaintiff's action to be vicariously liable for acts/omissions of D1 and D2. Whilst the plaintiff contended that it was unreasonable, rash, negligent and C careless of D1 and D2 to have relentlessly shot at his car throughout the pursuit, the defendants, in denying the plaintiff's claims, argued that the policemen had acted reasonably in the discharge of their duties. The defendants said the injuries suffered by the plaintiff would not have happened if he had simply obeyed the policemen's order to stop. D

Held, allowing the plaintiff's claim and awarding him RM602,505 in damages:

(1) The plaintiff had failed to prove a case of assault and battery against the E defendants but had proven on balance of probabilities that they were negligent. Although D1 and D2 were carrying out their official duties at the material time, they failed to exercise care. They should have known that shooting towards members of the public from a moving vehicle with the kind of road conditions they encountered that night was a recipe for F disaster. The plaintiff had proven that the defendants owed him a duty of care which was breached and that the damages he suffered as a result of that breach was foreseeable and not a remote consequence. The third to the sixth defendants were therefore vicariously liable for the actions of D1 and D2 pursuant to ss 5 and 6 of the Government Proceedings Act 1956 G and applicable case laws (see paras 74 & 77).

(2) The court found that since a rear tyre of the plaintiff's car was punctured by the shots fired by the policemen and the car had momentarily stopped (the first time), the threat perceived by D1 and D2 had ended. It was H therefore no longer reasonable for them to have continued shooting at the car when it again speed off. Given the fact that it was the police patrol car that was at all material times pursuing the plaintiff's car, the court failed to see the existence of any threat to the police officers. The negligence of the policemen could be seen from the fact that whilst the I majority of the bullet holes on the car were situated at the bottom part of the car and the tyres, two stray bullets had hit the windscreen, ceiling and visor above the driver's seat (see paras 70–71).

(3) Although the plaintiff was partly to blame for fleeing and disobeying the policemen's orders to stop the court opined that D1 and D2 had been

overzealous in their attempt to capture the plaintiff and, in that process, had used excessive force as could be seen from the number of bullet holes on the car. The injuries that the plaintiff suffered were not remote but foreseeable and it was the court's finding that the stray bullet fragments in the plaintiff's head were the most probable cause of the residual brain damage that he suffered (see paras 60 & 77).

(4) The medical evidence on the plaintiff's injuries was not disputed. The court found it justified to award the plaintiff a global sum of RM350,000 as general damages (for the brain damage, loss of ability to do simple calculations and weakness in the right upper limbs), RM12,505 as special damages and RM240,000 for loss of income and the inability to work in future (at the rate of RM1,250 x 12 months x 16 years). The award for general damages was to carry interest at 5% from date of filing of the writ until date of judgment. The special damages award was to carry interest at 2.5% from 10 November 2016 until the date of judgment. The whole of the judgment sum was to carry interest at 5% from 10 November 2016 until date of full settlement (see paras 85, 90–101 & 108).

(5) The plaintiff was not entitled to any damages for the tort of misfeasance in public office or for aggravated and exemplary damages. Neither was he entitled to the declaration that he sought as there was no mala fides in the actions of D1 and D2 (see paras 102–104 & 106).

[Bahasa Malaysia summary

Plaintif yang merupakan pekerja di sebuah ladang kelapa sawit menyaman defendan-defendan atas ganti rugi kerana kecederaan tubuh badan dan kehilangan pendapatan akibat tindakan defendan-defendan yang didakwa melakukan serangan, bateri dan/atau kecuaian. Plaintif juga menuntut ganti rugi bagi perlakuan tort misfeasans oleh defendan-defendan sebagai penjawat awam dan pelanggaran tugas statutori serta memohon perisytiharan bahawa defendan-defendan telah dengan sengaja dan/atau dengan niat salah melanggar hak asasinya di bawah Bahagian II Perlembagaan Persekutuan. Defendan pertama dan kedua ('D1' dan 'D2') yang masing-masing, merupakan seorang Konstabel Polis dan Koperal Polis, melakukan tugas pencegahan jenayah di dalam kereta peronda polis pada awal pagi 10 November 2016, apabila mereka melihat sebuah kereta yang bertingkap gelap dan tidak mempunyai nombor plat kenderaan yang lengkap serta dipandu dengan keadaan yang mencurigakan. Mereka kemudiannya memeriksa sistem komputer polis dan mendapati nombor plat itu milik sebuah motosikal. Anggota-anggota polis itu membunyikan siren amaran dan lampu berkelip mereka dan cuba memotong kereta untuk berhenti namun kereta itu sebaliknya memecut. Ketika itu, plaintif sedang memandu kereta bersama tiga rakannya di dalamnya. Walaupun kereta peronda, melalui pembesar suaranya, mengarahkan plaintif untuk berhenti, dia tidak berbuat demikian kerana dia tidak mempunyai lesen memandu atau insurans dan cukai jalan untuk

memandu kereta itu. Semasa mengejar, D2 mengarahkan D1 untuk menembak tayar kereta. Apabila beberapa das tembakan itu mengena tayar belakang kereta dan kenderaan itu bergerak perlahan, D1 dan D2 keluar dari kenderaan mereka untuk menghampiri kereta namun secara tiba-tiba mereka memecut lalu menyebabkan kejadian kejar mengejar dan satu lagi peluru dilepaskan ke arah kereta tersebut oleh anggota polis yang mengejar. Panik dengan tembakan itu, plaintif terus memandu sehingga sampai ke rumahnya di mana kereta itu terhenti selepas merempuh sebatang pokok. Keseluruhan kejadian kejar-mengejar polis meliputi jarak 31.3km dalam masa sekitar 30–40 minit. Semua saspek di dalam kereta itu menyerah diri kepada anggota polis. Serpihan dari tembakan itu telah memasuki kepala plaintif dan dia menjalani pembedahan untuk mengeluarkan sebahagian besar serpihan itu daripada otaknya. Beberapa serpihan yang telah masuk jauh ke dalam otak tidak dapat dikeluarkan dan menyebabkan plaintif mengalami kerosakan otak di lobus parietal kiri yang mengakibatkan kelemahan pada anggota badan atas dan bawah kanannya, ketidakupayaan untuk melakukan pengiraan matematik mudah dan kemungkinan mengalami sawan epilepsi pada masa akan datang. Kereta itu didapati mempunyai 14 lubang peluru pada badan dan cermin depannya. Plaintif menuntut defendan ketiga hingga defendan keenam bertanggungjawab secara bersesama terhadap perbuatan/peninggalan D1 dan D2. Walaupun plaintif berhujah bahawa D1 dan D2 tidak munasabah, terburu-buru, cuai kerana melepaskan tembakan tanpa henti ke arah keretanya sepanjang kejadian itu, defendan-defendan dalam menafikan tuntutan plaintif berhujah bahawa anggota-anggota polis telah bertindak secara munasabah ketika menjalankan tugas tersebut. Defendan-defendan menyatakan bahawa kecederaan yang dialami oleh plaintif tidak akan berlaku sekiranya mereka mematuhi arahan anggota-anggota polis supaya memberhentikan keretanya.

Diputuskan, membenarkan tuntutan plaintif dan membenarkan ganti rugi sebanyak RM602,505:

(1) Plaintif telah gagal membuktikan kes serangan dan bateri terhadap defendan-defendan namun berjaya membuktikan atas imbangan kebarangkalian bahawa mereka telah cuai ketika menjalankan tugas. Walaupun D1 dan D2 menjalankan tugas rasmi mereka pada masa yang material, mereka telah gagal melaksanakan tugas berhati-hati. Mereka sepatutnya tahu bahawa menembak ke arah orang ramai dari kenderaan yang bergerak dengan keadaan jalan raya pada malam itu boleh mengundang bencana. Plaintif telah membuktikan bahawa defendan-defendan mempunyai kewajipan berhati-hati dan ganti rugi yang dialaminya akibat pelanggaran kewajipan itu boleh dijangka dan bukanlah akibat yang jauh. Oleh itu, defendan ketiga hingga keenam bertanggunggan ke atas tindakan D1 dan D2 menurut ss 5 dan 6 Akta Prosiding Kerajaan 1956 dan kes duluan yang terpakai (lihat perenggan 74 & 77).

(2) Mahkamah mendapati bahawa apabila tayar belakang kereta plaintif ditembak anggota polis dan kereta itu telah berhenti seketika (kali pertama), ancaman yang dilihat oleh D1 dan D2 telah berakhir. Oleh itu, tidak lagi munasabah bagi mereka untuk terus menembak kereta apabila kereta itu sekali lagi memecut laju. Memandangkan kereta peronda polis yang pada setiap masa material mengejar kereta plaintif, mahkamah gagal melihat kewujudan sebarang ancaman kepada pegawai polis. Kecuaian anggota polis dapat dilihat dari fakta bahawa walaupun majoriti lubang peluru pada kereta terletak di bahagian bawah kereta dan tayar, dua peluru sesat terdapat di cermin depan, siling dan visor di atas kerusi pemandu (lihat perenggan 70–71).

(3) Walaupun plaintif juga bersalah kerana melarikan diri dan tidak mematuhi arahan anggota polis untuk menghentikan keretanya, mahkamah berpendapat bahawa D1 dan D2 telah berlebihan ketika menangkap plaintif dan dalam proses itu, telah menggunakan kekerasan yang berlebihan seperti yang dapat dilihat dari jumlah lubang peluru pada kereta. Kecederaan yang dialami plaintif bukanlah sesuatu yang jauh tetapi boleh dijangka dan mahkamah mendapati bahawa serpihan peluru sesat di kepala plaintif adalah kemungkinan punca paling besar yang menyebabkan kecederaan otak residual (lihat perenggan 60 & 77).

(4) Keterangan perubatan mengenai kecederaan plaintif tidak dipertikaikan. Mahkamah mendapati plaintif layak untuk jumlah global sebanyak RM350,000 sebagai ganti rugi am (bagi kerosakan otak, kehilangan keupayaan untuk melakukan pengiraan mudah dan kelemahan pada anggota atas kanan badan), RM12,505 sebagai ganti rugi khas dan RM240,000 bagi kehilangan pendapatan dan ketidakupayaan untuk bekerja pada masa hadapan (pada kadar RM1,250 x 12 bulan x 16 tahun). Pemberian ganti rugi am adalah dengan kadar faedah sebanyak 5% dari tarikh pemfailan writ sehingga tarikh penghakiman. Pemberian ganti rugi khas dengan kadar faedah sebanyak 2.5% dari 10 November 2016 sehingga tarikh penghakiman. Keseluruhan jumlah penghakiman adalah dengan kadar faedah sebanyak 5% dari 10 November 2016 sehingga tarikh penyelesaian penuh (lihat perenggan 85, 90–101 & 108).

(5) Plaintif tidak berhak mendapat sebarang ganti rugi bagi tort misfeasans penjawat awam atau ganti rugi teruk dan teladan. Beliau juga tidak berhak mendapatkan pengisytiharan yang dipohon kerana tiada keadaan mala fides di dalam tindakan D1 dan D2 (lihat perenggan 102–104 & 106).]

Cases referred to

Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur [2006] 2 MLJ 137, HC (refd)

A *Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal* [2014] 2 MLJ 49; [2014] 1 CLJ 316, CA (refd)
Chong Nyan Lai v Abdul Ghani b Othman [2010] 1 PIR [11] (refd)
Collins v Wilcock [1984] 3 All ER 374, QBD (refd)
Donnelly v Joyce [1973] 3 All ER 475, CA (refd)
B *Foong Nan v Sagadevan* [1971] 2 MLJ 24, FC (refd)
Ghani v Jones [1969] 3 All ER 1700, CA (refd)
Government of the State of Sabah v Syarikat Raspand (suing as a firm) [2010] 5 MLJ 717, CA (refd)
Hassan Marsom & Ors v Mohd Hady Ya'akop [2018] 7 CLJ 403, HC (distd)
C *Haystead v Chief Constable of Derbyshire* [2000] 3 All ER 890, QBD (refd)
Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238, HL (refd)
Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440, HC (refd)
In the matter of the petition of right of Tan Eng Hoe (petitioner) v The Attorney-General of the Straits Settlements [1933] 2 MLJ 151 (refd)
D *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)
Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)
John Andrew Maltose v Cyril Steven & Ors [2015] 7 MLJ 548, HC (refd)
E *Kalaiarasan a/l T Sukumaran v Khor Lye Choon* [2011] 2 PIR [6] (refd)
Kassim b Ibrahim & Anor v Syed Khodri b Syed Abdul Aziz [2009] 2 PIR [25] (refd)
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F *the estate of Aminulrashid bin Amzah, deceased) & Anor and another appeal* [2018] 5 MLJ 805; [2018] 1 CLJ 7929, CA (folld)
Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l
G *Ghaur Chandram) dan satu lagi rayuan* [2016] MLJU 1716; [2016] 3 CLJ 210, CA (refd)
Lee Geok Theng v Ngee Tai Hoo & Anor [2000] 4 MLJ 42; [2000] 1 LNS 220, HC (distd)
Letang v Cooper [1964] 2 All ER 929, CA (refd)
H *Mahmood v Government of Malaysia & Anor* [1974] 1 MLJ 103; [1973] 1 LNS 86 (refd)
Muhammad Shafiq Aiman bin Saad Hassan dan satu lagi v Mohd Fauzan bin Ismail [2021] MLJU 1488; [2021] 1 LNS 1240, HC (refd)
Nurasmira Maulat bt Abd Jaafar & Ors v Ketua Polis Negara & Ors [2015]
I 3 MLJ 105, CA (refd)
O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] AC 286, HL (refd)
Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 5 MLJ 360, CA (refd)

Ramachandran a/l Mayandy v Abdul Rahman bin Ambok Laongan & Anor [1997] 4 MLJ 237; [1996] 1 LNS 109, HC (refd)
Ramly & Ors v Jaafar [1968] 1 MLJ 209, FC (refd)
Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295, FC (refd)
Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor [1999] 6 MLJ 800; [1999] 1 LNS 83, HC (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219, PC (refd)
Shapiei bin Zainal Abidin & Ors v Shah Alam Officer in Charge of Police District OCPD & Ors [2016] 10 MLJ 279, HC (refd)
Shapiei bin Zainal Abidin (pentadbir harta pusaka si mati Allahyarham Muhamad Shamil Hafiz bin Shapiei) dan lain-lain lwn Ketua Polis Daerah Shah Alam dan lain-lain [2022] MLJU 609, HC (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)
Syarizan Sudimin & Ors v Abdul Rahman Bukit & Anor [2010] 3 CLJ 877, HC (refd)

Legislation referred to

Civil Law Act 1956 s 28A(d)(i)
Criminal Procedure Code s 15(2)
Federal Constitution Part II
Government Proceedings Act 1956 ss 5, 6
Penal Code ss 186, 307, 411
Poisons Act 1952
Police Act 1967 ss 3(3), 20, 20(3), (3)(a), 24

Azamuddin bin Abdul Aziz (with Muhamad Aizat) (Azamuddin & Co) for the plaintiff.
Nur Fauzani bt Mohd Nordin (with Muhammad Muhairi bin Mohamed Noh) (Federal Counsel, Attorney General's Chambers) for the defendants.

Noor Ruwena JC:

THE BACKGROUND

[1] This case was filed by the plaintiff against the defendants on 30 May 2019 and it was among those cases which were affected by the Covid-19 pandemic and trial had to be delayed due to movement control restrictions. Eventually, judgment was delivered on 13 July 2023 in favour of the plaintiff. The court found that the plaintiff had proved his case on a balance of probabilities and awarded damages totaling RM602,505. Dissatisfied, the defendants file a notice of appeal on 9 August 2023.

[2] Trial commenced before the then judicial commissioner of the Taiping High Court YA Tuan Muniandy a/l Kanyappan who was transferred to Shah

Alam High Court in February 2022. By then the plaintiff had called seven witnesses to testify on his behalf. I took over conduct of the trial with the plaintiff starring his evidence on 24 June 2022.

THE FACTUAL MATRIX

[3] The factual matrix were gathered from the pleadings and statements by the plaintiff and the first and second defendants. The plaintiff was an individual from Parit Abu Hassan Ban, Alor Pongsu, Kerian, Perak and who worked in an oil-palm estate prior to this suit. He sustained injuries allegedly due to gunshots discharged from the weapons of the first and/or second defendants during a hot pursuit in the early hours of 10 November 2016 in the area of the plaintiff's village within the district of Kerian.

[4] At the material time, the first defendant was a police constable in the Ibu Pejabat Polis Daerah Kerian ('IPD'). The second defendant was a police corporal and supervisor of the first defendant, also from the same IPD. Both of them were under the supervision, responsibility and/or control of the third defendant, who was the Officer in Charge of Police District of Kerian ('OCPD'). The fourth, fifth and sixth defendants were alleged to be vicariously liable for the actions and/or omissions of the first, second and third defendants.

[5] The plaintiff's pleaded causes of action were for assault and battery. Alternatively, the plaintiff claimed the defendants were negligent and/or committed breach of duty, and/or misfeasance in public office. In his statement of claim dated 30 May 2019 he sought from the court general damages, special damages, damages for loss of income of RM2,600 and continuing, damages for future loss of income or loss of ability to work, damages for misfeasance in public office, aggravated and/or exemplary damages, interests, costs and other relief. The plaintiff also sought a declaration that the defendants had, wilfully and/or with wrongful intent, breached his fundamental rights as contained in Part II of the Federal Constitution.

[6] The defendants denied any liability and pleaded that the first and second defendants had acted reasonably with reasonable force in accordance with the law in carrying out their tasks and statutory duties. Further, any losses and damages sustained by the plaintiff were wholly or mainly attributed to his own negligence. Moreover, the defendants averred that the principle of *volenti non fit injuria* applied because the plaintiff had voluntarily and negligently, at his own risk, placed himself in a situation which he knew or should have known would endanger his life and safety.

THE PLAINTIFF'S CASE

[7] On 10 November 2016 at about 12 midnight the plaintiff ('PW8') was driving a Proton Saga bearing registration No JBS 9410 in Kg Dew, Semanggol, Perak from Kamunting heading towards the direction of Alor Pongsu. In the car with him were three friends, namely, Muhammad Zulfikri bin Jamil ('PW1'), Muhammad Nizar bin Jamil dan Muhammad Emierul bin Mohamad Ali. The car was owned by the plaintiff, which he bought from a friend but the transfer of ownership had not been registered with JPJ. The plaintiff claimed that while he was driving along the said road, suddenly from the left, a police MPV driven by the first and second defendant overtook his car; the MPV beacon light and siren were on and he heard through the loudspeaker, the police ordering him to stop the car.

[8] The plaintiff was shocked and scared as he was driving without a licence and road tax, and therefore, he did not obey the command but instead drove into the village road to head back to his house. He alleged that after a while he was about to stop the car, the first defendant and/or second defendant discharged their weapons and shot at his car thereby causing him to fear for his safety. The plaintiff stated he became even more afraid as it was the first time he was being shot at. He decided not to stop the car and drove on to his house in Parit Abu Hassan. Upon reaching his house, he was stopping the car but the first and/or second defendant continued shooting at the car causing it to veer and went off the path. The car came to a stop in front of his house. He alleged that one of the shots had hit his head. All of them got out of the car and the plaintiff fell forward as he was getting out. His mother ('PW3') came out of the house at that time. She alleged that the first and second defendants were outside the car and pointing their guns towards the plaintiff, who was covered in blood, and his friends.

[9] Upon seeing the plaintiff's condition, the police called for an ambulance. The plaintiff was brought by ambulance to Hospital Parit Buntar and later he was referred to Hospital Taiping. On 11 November 2016, the plaintiff was then transferred to Hospital Raja Permaisuri Bainun ('HRPB') Ipoh for surgery to remove the bullet fragments in his brain. From HRPB Ipoh, on 13 November 2016 he was re-transferred to Hospital Taiping for continued treatment. The plaintiff was discharged on 22 November 2016. His mother lodged a police report on 10 November 2016 (Bagan Serai Report No 003725/16) whereas the plaintiff lodged his report two weeks later on 25 November 2016 (Bagan Serai Report No 003902/16). It was alleged that during the incident, the first and second defendant discharged a total of 22 bullets. The plaintiff's stepfather ('PW2') lodged a police report on 21 July 2017 regarding the discovery of bullet casings suspected to have been used the night of the incident (Bagan Serai Report No 000303/17).

[10] As a result of the first and second defendants' actions, the plaintiff pleaded that he sustained the following injuries:

> I. Kecederaan di kepala, luka tembakan, left parietal bone fracture. Craniectomy for removal of bullet. Few small pieces of foreign body was removed from wound. Brain was contused, dura torn, brain contaminated with hair and jaggered wound seen;
>
> II. Lumpuh sebelah kanan badan, right hand weakness;
>
> III. Gatal-gatal diseluruh kulit badan. Developed rashes. Unresolved diess syndrome, crusted scabies.

[11] It was the plaintiff's contention that he had not committed any crime that fateful night that would have justified the first and/or second defendant to use a firearm in such a manner that had resulted in the injuries as pleaded. The plaintiff's injuries were due to the negligent, rash, careless actions of and non-compliance with correct procedures and/or without legal and reasonable justification by both officers. The first and second defendants' handling and use of firearms were contrary to Standard Operating Procedures in the IGSO *Penggunaan Senjatapi oleh Pegawai Polis* issued by the fifth defendant in PTKPN BHG D 222.

THE DEFENDANTS' CASE

[12] The defendant's version was that the first and second defendants were on normal palrol duty that night. The second defendant drove the MPV PK187 whereas the first defendant was seated at the front passenger seat. Upon reaching Jalan Kamunting-Kerian they saw a modified Proton car (driven by the plaintiff) with tinted screens and the rear plate showing the No JBS 410. The first defendant did a system check and found that the No JBS 410 was registered to a motorcycle. Suspecting something was amiss, the MPV's beacon light and siren were switched on while the second defendant tried to overtake the car. However, the plaintiff applied the brakes and then made a 'U-turn' before entering Jalan Kampung Tua Semanggol.

[13] The police gave chase as soon as they were on Jalan Kampung Tua Semanggol. The plaintiff was repeatedly ordered to stop his car but he refused and speeded on. They alleged that the plaintiff's car drew alongside the MPV dangerously and tried to push it off the narrow road, and then it made a U-turn. This almost caused the MPV to skid to the right. The MPV pursued the Proton while at the same time, the first defendant radioed the Bilik Gerakan at the IPD for assistance. The MPV continued to chase after the plaintiff's car for about 30–40 minutes. Then, as they did not received any feedback from the Bilik Gerakan, at Jalan Kampung Batu 38 the second defendant directed the first defendant to open fire towards the tyres of the plaintiff's car. But the Proton did not stop. The shot punctured one of the rear tyres and the car slowed down and then stopped. The first and second

defendants got out and approached the car to check on the driver. Suddenly the Proton moved forward and accelerated, leaving the policemen behind. They quickly got back into the MPV and chased the Proton again.

[14] The second shot was fired at Jalan Besar Alor Pongsu. Sparks could be seen from the rim of the rear tyre. The police saw the plaintiff's car, despite the punctured tyre, still being driven until it reached Parit Abu Hassan Ban, ie the plaintiff's house, where the car came to a stop after it skidded and crashed into a tree in front of the house. The first and second defendant alighted from the MPV and again approached the car. They saw three occupants of the car coming out and surrendered to them. Then the plaintiff clambered out from the front passenger seat as the driver's door could not be opened due to the crash. He was injured and the second defendant contacted the Bilik Gerakan where one of the policemen on duty there called for an ambulance, which arrived not long after and brought the plaintiff to Hospital Parit Buntar.

[15] The police opened an investigation paper under s 307 of the Penal Code for attempted murder when the plaintiff allegedly tried to force the MPV off the narrow village road. Investigation showed that the police pursued the plaintiff's car for a total distance of 31.3km after the first warning was given. Forensics investigation was conducted and the experts found traces of 14 gunshots on the body of the Proton Saga whereby two of them were strayed shots at the back screen as can be seen in photograph exh P35.

[16] The defendants pleaded that the policemen had acted reasonably and with reasonable force pursuant to the plaintiff's own response when he refused from the start to co-operate with the police. Further, his injuries were due to contributory negligence on his part. Hence, there was no negligence or assault and battery committed on the plaintiff by the defendants. The plaintiff was not entitled to any damages suffered as a result of his own frolic.

[17] Nevertheless, the plaintiff denied that he drove in a suspicious or dangerous manner as pleaded by the defendants and in regard to the no plate, one of the digits had fallen without him realising it. Further he claimed that not only the first defendant was firing at the Proton, even the driver of the MPV ie the second defendant also fired shots at his car. Therefore, disputing the defendants' version of the incident while at the same time alleging that both policemen acted in an unreasonable and reckless manner which resulted in serious injuries to his brain.

[18] The results of police investigations into the case were revealed in the defence statement that:

A (a) Muhammad Nizar bin Jamil, Muhammad Zulfikri bin Jamil and Muhammad Emierul bin Mohammad Ali were arrested on 10 November 2016 and remanded seven days for investigation after a plastic Coca Cola 390ml bottle containing *ketum* liquid was found under the front passenger seat of the Proton Saga;

B (b) on 12 April 2017, Muhammad Emierul bin Mohammad Ali was charged under the Poisons Act 1952 in respect of the *ketum* liquid found in the car and was sentenced to a fine of RM3,000 in default six months' imprisonment after he pleaded guilty to the charge;

C (c) the surgery on the plaintiff's brain showed the presence of foreign metal shrapnels embedded in the brain matter;

(d) some of the foreign metal shrapnels which the surgeon managed to retrieve were sent to the Chemistry Department of Malaysia for analysis;

D (e) the Chemistry Department of Malaysia analysis could not ascertain whether the foreign metal shrapnels were the same material or whether they came from the bullets fired from the first and second defendants' weapons, ie each a Walther P99;

E (f) the investigation officer ('SD7') recorded the statements of all witnesses in this case including family members of the plaintiff;

(g) inquiries made with JPJ showed that the plaintiff did not possess a driving licence and the road tax of the Proton Saga had expired;

F (h) the plaintiff had a warrant of arrest issued against him on 3 March 2016 for a traffic offence of driving without a licence;

(i) the plaintiff had a previous conviction record for possession of stolen property under s 411 of the Penal Code in 2015 (Kuala Kurau Report 889/14);

G (j) the investigation paper was referred to the deputy public prosecutor on 3 April 2017 and the instruction was to charge the plaintiff under s 186 of the Penal Code for obstructing a public servant in the discharge of his functions; and

H (k) on 19 April 2017, the plaintiff was charged under s 186 of the Penal Code at the Parit Buntar Magistrate's Court and was fined RM3,000 in default seven months imprisonment after he pleaded guilty.

THE TRIAL AND ISSUES TO BE TRIED

I **[19]** During the trial which commenced on 11 January 2021 and ended on 2 December 2022, 11 witnesses including the plaintiff testified in support of his case. Meanwhile, five witnesses testified for the defendants including the first and second defendants. The witnesses for each side were as follows:

(a) plaintiff's witnesses:

(i) Muhammad Zulfikri bin Jamil (PW1) passenger of the Proton;

(ii) Norpisah bt Shah Bani (PW2), plaintiff's mother;

(iii) Lei bin Mansor (PW3), plaintiff's stepfather;

(iv) Ahmad Farizad bin Mat Yazid (PW4), plaintiff's employer;

(v) Kost Nurul Hidayah (PW5), recipient of police report (FIR);

(vi) DSP Rozomi bin Mat Derus (PW6), Ketua Bahagian Siasatan Jenayah Taiping;

(vii) Abdul Razif bin Abd Rafar (PW7), part-time employee of Tetuan Azamuddin & Co;

(viii) Muhammad Isma Izami bin Jaafar (PW8), plaintiff;

(ix) Dato' Dr Hj Fadzli Cheah Abdullah @ Cheah Kow Chye (PW9), consultant neurosurgeon, Hospital KPJ, Ipoh who prepared the medical report P31;

(x) Dr Jason Raj a/l Johnson Kovipillai (PW10), former neurosurgeon at HRPB Ipoh who prepared the medical report P32; and

(xi) Dr Calvin Dinash Joackim a/l Joseph (PW11), medical officer, Neurosurgery Department, Hospital Taiping who prepared the medical report P33.

(b) the defendants' witnesses:

(i) Dr Ooi Ai Lee (DW1), rehabilitation medicine physician, Department of Rehabilitation Medicine, HRPB Ipoh;

(ii) Konst Muhamad Zafran Aiman bin Muhamad Zainol (DW2) first defendant;

(iii) Insp Mohd Hafizul bin Mohamad Azizan (DW3), former investigation officer, IPD Kerian;

(iv) ASP Noraini bt Awang @ Ali (DW4), former pegawai siasatan tempat kejadian, Makmal Forensik Cheras; and

(v) Kpl Zulkifli bin Sulaiman (DW5), second defendant.

[20] There were only two issues for this court's determination as follows:

(a) whether the shots fired by the first defendant and second defendant were lawfully discharged; and

(b) whether the plaintiff was entitled to the damages pleaded.

A EVALUATION AND FINDINGS OF THE COURT

[21] In determining whether the defendants were liable at all in this case, the court was guided by the case laws that the parties had referred to which were applied to the facts of the case. After a careful scrutiny of the notes of evidence, the court found that the evidence of the two policemen to a certain extent corroborated the plaintiff's version of what happened that fateful night. There were some parts of their evidence which contradicted the evidence of the plaintiff. Therefore, the court looked at the evidence of another witness whose evidence was no less important, namely PW1 who testified for the plaintiff. He gave his account of what transpired during the hot pursuit. In summary, he told the court that all of them were frightened when the Proton was followed by the MPV and they heard the police ordering them to stop. PW1 said that all of them did not possess a valid driving licence. The plaintiff also told them that the car was not insured and did not have a road tax. PW1 and the other two passenger tried to coax the plaintiff to stop the car because they reasoned that at most, he would be summoned for traffic offence. Hence, the plaintiff turned around to head back to his house.

[22] Some time later as the car was about to stop, he said the police MPV that were following them suddenly shot at the car. He could see and feel some of the shots hitting the roof of the car and its tyre. He felt the car slowing down as the tyre was already punctured. They did not come out of the car and the police kept on shooting at the car. The plaintiff became even more panicked and said he wanted to return home. PW1 did not know how many shots were fired but there were many which hit the Proton. When they reached the plaintiff's house, PW1 said the police was still shooting at the car and this caused the plaintiff to lose its control, the car then skidded and crashed into a tree. They crawled out of the car and he saw that the plaintiff's head was injured because of the gunshots by the police. The police had stopped shooting at them at that time. He said that at no time did the plaintiff tried to force the MPV off the road. However, he claimed that it was the police that tried to force their car off in order to make it stop, and the two policemen also shot at the tyres of the car.

[23] In his cross-examination, it was elicited by the SFC that this witness had only known the plaintiff about 2–3 months prior to the incident. Although their houses were not that far from each other, he only befriended the plaintiff in that year. He came to know the plaintiff through his younger brother, who was also a passenger in that car. That night they went out for a meal in Alor Pongsu and returned around midnight. He was seated at the back with Muhammad Emierul bin Mohammad Ali while his brother, Muhammad Nizar bin Jamil, was seated next to the plaintiff. According to this witness, based on the sketch plan on p 1 of Ikatan Dokumen Bersama (IDB, Part A), he first heard the siren when they were already on the village road. But the beacon

light was not yet switched on. It was put to PW1 that the MPV chased the plaintiff's car for quite a long distance until the first gunshot was fired and he agreed. He also agreed that the police was shooting towards the tyres, bumper and rear windshield of the Proton. He agreed further that when the tyres had been punctured, the car should have not been able to move. However, he disagreed that the policemen stopped the MPV, went out and approached the plaintiff's car after the tyres had been punctured. He said only the rear tyres were flat and this evidence was supported by the plaintiff.

[24] It was established that the route taken by the plaintiff was not a straight road but a winding road at some parts (*bengkang-bengkok*). He denied that the plaintiff was speeding becaused there was some problem with the car engine. Moreover, the road was very bumpy, narrow, winding and it was very dark as the road was only sparsely lit by street lights. PW1 told the court that the plaintiff did not stop at his house after the first shot was fired because the latter was scared as the police were still shooting at the car and so, he took the longer route to go back. They were shooting from behind the Proton towards the rear windshield. After the car crashed into the tree in front of the plaintiff's house, his mother and younger brother came out of the house and shouted at the policemen to stop shooting.

[25] When the plaintiff's mother ('PW2') testified in court, she stated she had heard numerous shots being fired outside the house. Then as she came out of her house, she saw the policemen training their weapons at her son's head. But later in cross-examination she admitted that she never mentioned this in her police report that was lodged on the same day of the incident. The evidence of these two witnesses in respect of the shooting have to be tested with the evidence of the plaintiff and the first and second defendants where there was corroboration of material particulars. The court found that the evidence of PW1 and PW2 were more believable on a balance of probabilities. Although they testified before the previous judicial commissioner, the notes of evidence were available for my scrutiny. I found that PW1's evidence withstood the cross-examination by the SFC and I accepted his evidence as the truth. There were some discrepancies but on minor points and it was due to one's ability to recollect events of the incident that took place five years prior to the trial.

[26] Moving on to another important witness on tho issue of ascortaining the defendants' liability, it is necessary to set out extracts of the evidence of DW4 here for reference. DW4 in her witness statement marked as PSSD4 stated that her job was to assist the investigation officer in collecting evidence from the crime scene such as samples for DNA, trace effects, dusting for finger prints and gunshot traces. Her investigation on the Proton were as follows:

J: Hasil pemeriksaan saya mendapati terdapat 14 kesan tembakan iaitu:-

(a) 1 kesan tembakan pada bahagian bawah bonet belakang sebelah kanan;

(b) 1 kesan tembakan bahagian bawah bonet sebelah kanan;

(c) 1 kesan tembakan pada rim tayar belakang sebelah kanan;

(d) 1 kesan tembakan pada cermin bahagian belakang;

(e) 2 kesan tembakan pada bahagian luar pintu belakang sebelah kiri;

(f) 1 kesan tembakan pada cermin hadapan;

(g) 1 kesan tembakan pada bahagian dalam cermin belakang;

(h) 4 kesan tembakan pada bahagian bawah bumbung motorkar;

(i) 1 kesan tembakan pada bahagian dalam pintu belakang sebelah kiri;

(j) 1 kesan tembakan pada bahagian bawah chasis pintu belakang sebelah kiri.

11. S: Berdasarkan pengalaman Puan, adakah tembakan tersebut bertujuan untuk memberhentikan kenderaan?

J: Hasil daripada pemeriksaan kenderaan tersebut, saya dapati beberapa kesan tembakan menunjukkan tembakan tersebut menghala ke bahagian bawah tayar belakang kenderaan tersebut. Walau bagaimanapun, terdapat beberapa kesan tembakan tersasar.

12. S: Apakah yang puan maksudkan dengan kesan tembakan tersasar?

J: Apa yang saya maksudkan dengan kesan tembakan tersasar di mana saya mendapati hanya 2 kesan tembakan tidak terkena pada tayar tetapi terkena pada cermin kenderaan tersebut.

...

14. S: Bagaimana keadaan tempat kejadian tersebut?

J: Saya dapati jalan ke tempat kejadian agak sempit, tidak rata, beralun dan bengkang-bengkok.

...

16. S: Berdasarkan daripada pemerhatian tempat kejadian, pemeriksaan kenderaan dan maklumat berkaitan kes daripada Insp Hafizul, apakah yang dapat kamu rumuskan?

J: Hasil daripada pemeriksaan kenderaan dan pemerhatian di tempat kejadian, saya membuat rumusan kesan tembakan yang terdapat pada kenderaan adalah untuk memberhentikan kereta. Walau bagaimanapun 2 kesan tembakan yang tersasar besar kemungkinan berpunca daripada keadaan fizikal jalan yang tidak rata dan beralun.

[27] In her cross-examination, DW4 told the court that apart from assisting the investigation officer in collecting evidence from the crime scene, based on her past experiences on the job, she also made conclusions from the evidence

available before her. In her opinion, due to the topography along the route both cars had taken and in a hot pursuit, the most likely position of the shooter when the shots were discharged was when the MPV was turning (*berpusing*). When the court asked her to elaborate what she meant by 'berpusing', DW4 stated:

> Keadaan berpusing kereta maksudnya anggota dalam keadaan menegak so besar kemungkinan anggota masa melepaskan tembakan itu tersasar ke hadapan dan cermin dan ke belakang. Maksudnya masa anggota tengah *follow* dan jalan bentuk S, besar kemungkinan dia berhadapan maksudnya dalam keadaan angota menegak kereta dalam bentuk S berpusing sikit dalam situasi takde dalam keadaan menegak, itu kesimpulan saya lah. Sebab sepanjang saya tengok dalam perjalanan kenderaan mula anggota *follow* sampai habis sampai ke rumah itu ada situasi jalan yang beralun dan berbentuk 'S'.

[28] Afterwards, the court asked DW4 a series of questions to obtain clarification on her testimony particularly on the projection of the bullets and where they ended after the shots were fired by the policemen. DW4 explained that the photographs in P30(1–42) showed the bullet holes and her report was as per exh P45. The bullet hole in Photograph Nos 9 and 10 showed that the bullet ended atop of the dashboard and was stuck there. The bullet hole in Photograph Nos 16 and 17 was caused by a bullet entering the rear windshield in Photograph No 19. Photograph No 31 showed interior ceiling of the car where a bullet ended at p 32 at the place marked 44. Photograph No 35 showed a bullet hole at the place marked 45. She did not find any casing or bullet for that hole after searching for it, saying that it had dropped somewhere. They also tried to find bullet fragments but to no avail. When asked whether it could have entered a person's body, she said it was possible that upon entry into one part of the car, a bullet may disintegrate and enter a body part or penetrate the glass screen. The court was guided by this expert evidence in coming to a conclusion in respect of the liability issue because it was in regard to scientific evidence. There was nothing on the record to show that DW4 might have been biased in her evidence and therefore, I have accepted her testimony as a reliable expert evidence.

[29] The evidence of PW6 who testified in respect of the IGSO on usage of firearms by the police was no less important to the determination of the extent to which the police may lawfully use such weapons, and the court will discuss this document later in the grounds of judgment. Lastly, the court looked at the medical evidence given by the three doctors, namely PW9, PW10 and PW11. The evidence given by PW9, Consultant Neurosurgeon at Hospital KPJ, Ipoh, was in regard to the medical report P31 which he prepared. Meanwhile, PW10 and PW11 treated the plaintiff when he was hospitalised at both HRPB Ipoh and Hospital Taiping, respectively. PW10 was a Neurosurgeon at HRPB Ipoh who prepared the medical report P32 (now in private practice) and PW11 was the medical officer, Neurosurgery Department, Hospital Taiping who prepared the medical report P33. Their evidence would very much be on the

A determination of quantum of damages should the court find the defendants liable for the actions of the first and second defendants.

[30] Upon perusal of all the evidence, particularly from PW9, the court was able to determine that the injuries sustained to the plaintiff's brain was caused by the gunshot discharged by the first and/or second defendants during the hot pursuit. PW9 met the plaintiff for an examination about two years and four months after the incident. He did a CT brain scan on 20 February 2019 and confirmed there was a residual brain damage at the left parietal lobe of the brain with a small metallic foreign body lodged in the area of the brain that was damaged. This CT scan findings was consistent with gunshot wound. PW9 confirmed that there was definitely brain damage of the left parietal lobe. He told the court that during the surgery done in HRPB Ipoh, most of the foreign body had been removed but what was left behind was a tiny spec of metallic body from the gun embedded in the brain. The metallic body should just be left there because it was difficult to find due to the tiny size. It would entail more invasive surgery and he said '… you must cut the brain here and there and will cause more damage. So usually we don't touch it anymore'.

[31] Most of the specs had been taken out from the first surgery as the surgeon had done the best to remove whatever that could be seen with the naked eye. This did not include the bone fragments where it was written in the report the bullet hit the bone and fractured into many pieces, and therefore they also had to remove many fragments of the bone (of the brain). The gunshot was not just his opinion but also the radiologist's (report), he added. PW9 then explained that although the Hospital Taiping report ('P33') concluded 'moderate head injury, I put there as severe because the brain damage is severe so in fact. Puan, yang ini kita ada kecederaan otak, kita bahagikan mild moderate and severe three stages. Severe sebab ikut finding CT scan dan weakness selepas dua tahun masih weak. I think can classify as severe …'. In cross-examination he also disagreed that the right-side weakness happened earlier than the gunshot incident because P33 also mentioned it. Prior to that there was no mention of weakness in the patient's history.

Finding of facts on liability issue

[32] Needless to say, the court found that PW1's evidence corroborated the plaintiff's version of events. Based on all these evidence including the plaintiff's and the first and second defendants, the court made the following finding of facts:

(a) the defendants were on a crime prevention round at the old Butterworth–Taiping road when they saw the Proton car being driven by the plaintiff with a missing digit on the number plate as can be seen in the photograph marked as P30(3);

(b) upon checking with the police computer system, the No JBS 410 belonged to a motorcycle;

(c) the tinted screen of the modified car and the manner of plaintiff's driving had raised police suspicion that a crime was being committed;

(d) the MPV's beacon light and siren were switched on and the police vehicle did try to overtake the Proton car to stop it;

(e) the plaintiff did not stop but accelerated, made a U-turn and went onto Jalan Kampung Tua Semanggol to return home;

(f) the plaintiff's friends urged him to surrender;

(g) the plaintiff was repeatedly ordered to stop his car but he refused and speeded on;

(h) the MPV pursued the Proton car while at the same time, the first defendant radioed the *Bilik Gerakan* at the IPD for assistance;

(i) the MPV continued to pursue the plaintiff's car for about 30 minutes;

(j) as they did not received any feedback from the Bilik Gerakan, at Jalan Kampung Batu 38 the second defendant directed the first defendant to open fire towards the car tyres;

(k) somewhere near Parit Abu Hassan the shot(s) punctured the right rear tyre and the car slowed down;

(l) the first and second defendant got out and approached the car to check on the driver;

(m) the Proton car moved forward and accelerated, leaving the policemen behind;

(n) they fired towards the car and then the first and second defendant quickly got back into the MPV and pursued the Proton again;

(o) the second round of shots was fired at Jalan Besar Alor Pongsu;

(p) sparks could be seen from the rim of the rear tyre and the plaintiff's car, despite the punctured tyre, was still being driven until it reached Parit Abu Hassan Ban, ie the plaintiff's house;

(q) the Proton Saga came to a stop after it skidded and crashed into a tree in front of the house;

(r) the first and second defendants alighted from the MPV and again approached the car with their weapons in hand;

(s) the three other occupants of the car came out and surrendered to them;

(t) the plaintiff clambered out (as he was injured) from the front passenger seat as the driver's door could not be opened due to the crash;

(u) the second defendant contacted the Bilik Gerakan where one of the policemen on duty there called for an ambulance;

(v) the plaintiff was immediately brought to Hospital Parit Buntar;

(w) on 11 November 2016, the plaintiff was transferred to HRPB Ipoh for surgery to remove the bullet fragments in his brain;

(x) on 13 November 2016 he was re-transferred to Hospital Taiping for continued treatment and discharged on 22 November 2016;

(y) PW2 lodged a police report regarding the incident on 10 November 2016 (Bagan Serai Report No 003725/16) whereas the plaintiff lodged his report two weeks later on 25 November 2016 (Bagan Serai Report No 003902/16);

(z) the total distance of the pursuit was approximately 31.3km within a period of 30–40 minutes;

(aa) DW4's opinion that the gunshots were fired towards the Proton Saga from behind to stop the car;

(ab) there were 14 traces of gunshots on the body and windshields of the car;

(ac) there were two traces of gunshots out of the 14 found that were strayed shots most likely due to the physical condition of the narrow, uneven and winding road; and

(ad) in regard to the plaintiff's injuries, there was residual brain damage at the left parietal lobe of the brain with a small metallic foreign body lodged in the area of the brain that was damaged and consistent with gunshot wound.

Liability of the defendants

[33] In order to ascertain the first issue stated earlier in the grounds of judgment the court was urged to determine the following questions:

(a) whether the first defendant and second defendant had a proper and reasonable justification to discharge their weapons in the circumstances and facts of the case;

(b) whether the first defendant and second defendant had followed the proper and valid procedures to stop a suspect's vehicle in order to conduct an investigation and making an arrest;

(c) whether the first defendant and second defendant had given any reasonable warnings or taken any reasonable measures before discharging their weapons; and

(d) whether the shots discharged were proportionate to stop the plaintiff's car. A

[34] The cause of action by the plaintiff was founded on assault and battery and/or negligence. Learned counsel for the plaintiff submitted that the police would be liable in tort for injuries sustained by a member of the public when the injuries were the direct result of police actions. He relied on the English case of *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 where it was held: B

> The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty. C D
>
> *There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are Knightley v Johns* [1982] 1 WLR 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242. Further, a police officer may be guilty of a criminal offence if he wilfully fails to perform a duty which he is bound to perform by common law or by statute: see *Reg v Dytham* [1979] QB 722, where a constable was convicted of wilful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene. (Emphasis added.) E F

[35] Meanwhile, 'battery' has been defined in *Collins v Wilcock* [1984] 3 All ER 374 as 'the actual infliction of unlawful force on another person'. In that case the appellate court held: G

> We are here concerned primarily with battery. The fundamental principle, plain and incontestable, is that every person's body is inviolate. *It has long been established that any touching of another person, however slight, may amount to a battery.* So Holt CJ held in 1704 that 'the least touching of another in anger is a battery': see *Cole v Turner* 6 Mod Rep 149, 90 ER 958. The breadth of the principle reflects the fundamental nature of the interest so protected; as Blackstone wrote in his Commentaries, 'the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner' (see 3 Bl Com 120). The effect is that everybody is protected not only against physical injury but against any form of physical molestation. (Emphasis added.) H I

[36] In the case of *Haystead v Chief Constable of Derbyshire* [2000] 3 All ER 890, the appellate court there held that:

A

> It was clear that the defendant knew full well that he had created a dangerous situation and the inescapable inference was, that he decided to take the risk of someone using the machine before he could get back and render it harmless or gave no thought to that risk.

B

[37] Therefore, the plaintiff submitted that battery may be proved when the action was committed recklessly wherein the police could have anticipated that the act would bring grievous risks to the victim but nonetheless chose to proceed with the act and thereby caused such grievous harm to the victim. In support of their contention, the plaintiff also referred to the Malaysian cases involving shooting incidents by police against members of the public: *Ketua Polis Daerah Shah Alam & Ors v Nor Azura bt Amzah (administrator for the estate of Aminulrashid bin Amzah, deceased) & Anor and another appeal* [2018] 5 MLJ 805; [2018] 1 CLJ 7929; *Shapiei bin Zainal Abidin & Ors v Shah Alam Officer in Charge of Police District OCPD & Ors* [2016] 10 MLJ 279; *Shapiei bin Zainal Abidin (pentadbir harta pusaka si mati Allahyarham Muhamad Shamil Hafiz bin Shapiei) dan lain-lain lwn Ketua Polis Daerah Shah Alam dan lain-lain* [2022] MLJU 609; and *Nurasmira Maulat bt Abd Jaafar & Ors v Ketua Polis Negara & Ors* [2015] 3 MLJ 105. The court will go into the details of these cases later. For convenience, I will refer to the two *Shapiei bin Zainal Abidin* cases as *Shapiei bin Zainal Abidin (No 1)* and *Shapiei bin Zainal Abidin (No 2)* respectively. The second case was on assessment of damages after the Court of Appeal on 1 September 2016 allowed the appellants' appeal holding the respondents liable for the deaths of the victims. The case was sent back for damages to be assessed by the senior assistant registrar. Dissatisfied with the assessment of damages, the dependants of the vicitms appealed against the decision to the judge in chambers.

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[38] On the other hand, the defendants submitted that the plaintiff's evidence were insufficient, since he bore the legal burden, to prove his claims on a balance of probabilities: *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037 (FC); *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31 (FC) and *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 (FC). The evidence adduced on behalf of the plaintiff not only did not prove the negligence of the defendants, the elements of negligence had not been satisfied. The court was referred to the case of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360 where the Court of Appeal stated:

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> [67] Negligence is a tort and three things must be proved to support the claimant's claim:
>
> (a) that the defendant owes the claimant plaintiff a duty of care;
>
> (b) that the defendant is in breach of that duty of care; and

(c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.

[68] According to Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, p 784:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

[69] The standard of conduct to determine negligence is that of the reasonable man. It is an objective test.

[39] The learned senior federal counsel ('SFC') systematically argued on behalf of the Government that the plaintiff failed to prove negligence of the first and second defendants because the evidence was clear that during the hot pursuit, both policemen had taken all the necessary and reasonable measures such as by introducing themselves as police and gave adequate warnings at the material time. It was submitted further that the plaintiff's claims would fail because the law on assault and battery required that the elements of 'physical contact' or 'direct transmission of force' to be present. In the earlier cited case of *Collins v Wilcock*, Robert Goff LJ held:

> ... An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person; a battery is the actual infliction of unlawful force on another person ...

[40] Reference was also made to *Halsbury's Laws of Malaysia Vol* 13(2) 2020 Reissue (pp 488–489) that:

> *Trespass to the person is an actionable wrong committed against the safety and freedom of a person, namely assault, battery and false imprisonment ... For liability to arise, the act complained of by the plaintiff must be either intentional or negligent.* The plaintiff bears the burden of proof and he must plead that the act was either intentional or negligence, stating the facts which he alleges to constitute negligence ... (Emphasis added.)

[41] The SFC also argued that there was no intention on the part of both policemen to deliberately cause such injuries to the plaintiff because they were merely carrying out their statutory duties in crime prevention. Hence, the legal requirement for assault and battery had not been proved. What may have occurred at the material time was only likely negligence applying the principle in the famous case of *Letang v Cooper* [1964] 2 All ER 929 where Lord Denning MR held:

> ... If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the

person. 'The least touching of another in anger is a battery. *If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus, it is not enough nowadays for the plaintiff to plead that 'the defendant shot the plaintiff'. He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence ...* (Emphasis added.)

[42] The defendants submitted further that the facts clearly showed that the plaintiff brought on the injuries onto himself due to his own contributory negligence when he:

(a) failed to co-operate with the police although ample warnings had been reasonably given by the first and second defendants;

(b) failed to surrender and intended to escape by accelerating his car to avoid arrest;

(c) placed himself and the other passengers in the car and other road-users including the first and second defendants in a perilous situation and life threatening manner when he tried to force the MPV off the narrow village road; and

(d) created a situation (in the manner of his driving) which gave rise to a reasonable suspicion that the plaintiff was a criminal leading to the hot pursuit by the police.

[43] It was the defendants' contention that the evidence showed that based on *reasonable suspicion* due to the suspected false no plate and the plaintiff's manner of driving and refusing to stop his car after warnings had been given, it was justified for the first and second defendants to use all reasonable measures including to discharge their firearms after 21.3km of pursuing the Proton Saga to stop the car. The SFC referred the court to a no of case laws on the issue of the test to determine reasonable suspicion, amongst others the cases of *Ghani v Jones* [1969] 3 All ER 1700; *Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor* [1999] 6 MLJ 800; [1999] 1 LNS 83; *In the matter of the petition of right of Tan Eng Hoe (petitioner) v The Attorney-General of the Straits Settlements* [1933] 2 MLJ 151; *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286; *Ramly & Ors v Jaafar* [1968] 1 MLJ 209.

[44] In *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219, it was submitted that the test for *reasonable suspicion* did not reach the standard of *prima facie proof* for the purpose of a criminal conviction, hence the threshold was much lower. The Privy Council in that case held:

Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In *Dumbell v Roberts & Ors* [1944] 1 All ER 326 Scott LJ said at p 329:

> The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction;.

[45] The Privy Council went on to explain the distinction between 'prima facie proof' and 'reasonable suspicion' as follows:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage ... By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate prima facie proof as a prerequisite for arrest ...
>
> There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all ... Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case.

[46] In *Saul Hamid bin Pakir Mohamad* the court applied the above principle and stated:

> ... the court has to keep foremost in its mind the distinction between 'reasonable suspicion' and 'prima facie proof'. That prima facie proof consists of admissible evidence whilst suspicious can take into account matters that could not be put in evidence at all ... in determining whether a complaint is reasonable, an objective test and not a subjective test should be applied.

[47] It was therefore submitted by the defendants that any reasonable man such as the first and second defendants would have reasonable suspicion of the situation prior to the shots being discharged. Moreover, any reasonable man would have stopped for police inspection upon being so ordered. In this regard, based on the evidence of PW1, the plaintiff and the first and second defendants, the court found that indeed the plaintiff did not want to get arrested and so he fled the scene in his car upon becoming aware of the presence of the police MPV. PW1 and the other two passengers reasoned with the plaintiff that he should just surrender as he had only committed a few traffic offences. There was uncontroverted evidence that the plaintiff headed back to his house near Parit Abu Hassan after he was advised by his friends. However, the first and second defendants did not know that was the plaintiff's intention

and so they followed the Proton Saga all along until he stopped near Jalan Kg Batu 38 where the first shot(s) was fired.

[48] At this point of time, the court found that there was reasonable suspicion because of the plaintiff's manner of driving and his disregard of the police's command for him to stop the car. *But his explanation why he did not stop the car was also reasonable, that he was so scared of being arrested because he did not possess a valid driving licence, road tax and it goes without saying, insurance for the car. He had in fact committed mutiple traffic offences.* The court also found that his reaction after the police fired the first shot(s) was that of a reasonable man who was so frightened after being shot at that he decided it was unsafe for him to stop the car. PW1 told the court that the plaintiff became so scared that he aborted his plan to return home (prior to the gunshots) and took the longer route instead. This evidence could not be challenged by the defendants. Hence, the court accepted it as the truth on a balance of probabilities.

[49] The court will now go on to consider the evidence to answer the questions of whether the first and second defendants had a proper and reasonable justification to discharge their weapons in the circumstances of the case, whether both of them had followed the proper and valid procedures to stop a suspect's vehicle in order to conduct an investigation and making an arrest, whether both of them had given any reasonable warnings or taken any reasonable measures before discharging their weapons and whether the shots discharged were proportionate to stop the plaintiff's car.

[50] DW5's evidence in cross-examination was self-exculpatory, unsurprisingly. He told the court that when the instruction was given to DW2 to fire the first shot, he considered that there was a threat to both their safety as well as to their surroundings wherein he alleged that the Proton Saga was driven recklessly and dangerously by the driver of the car. By then both cars were in the village area within an oil palm plantation, I was dark and quiet and unfamiliar terrain for him. The MPV was about 5 meters behind the Proton Saga. He had calculated the risks involved when he tried to give DW2 some space to fire the gun towards the right rear tyre of the suspect's car. To the court, his rationale was baffling to a certain extent and this was what he said:

Q. 28: Semasa tembakan dilepaskan kenderaan di mana?

A. 28: Kenderaan polis di belakang.

Q. 29: Secara khususnya dibelakang?

A. 29: Kami cuba beri ruang untuk Konstable Zafran melepaskan tembakan ruang belah kanan. Kalau saya masuk belah kiri mungkin akan menyebabkan peluru akan tersasar ataupun terbabas ke tepi tebing dan saya pastikan ada ruang belah kanan tu jadi saya masuk ke ruang belah kanan untuk bagi ruang Konstable Zafran

melepaskan tembakan. Pada fikiran saya belah kanan mempunyai kelebihan kepada Konstable Zafran untuk melepaskan tembakan.

...

Q. 31: Kenapa, kalau sebelah kiri? (MAHKAMAH)

A. 31: Kalau sebelah kiri Yang Arif pada pandangan saya, akan menyusahkan Konstable Zafran untuk menghala ke arah tayar dan dia terpaksa menghulurkan badannya keluar tingkap dan menyusahkan.

Q. 32: Kalau kanan pun dia masih menghulurkan badannya kan?

A. 32: Dia tidak banyak Yang Arif. Kalau belah kiri Yang Arif saya bawa belah kiri Konstable Zafran terpaksa (tunjuk position) jadi saya tidak boleh himpit belah kiri sebab ada tebing belah kiri. Kalau kanan ada ruang sikit.

...

A. 35: Tidak payah Yang Arif, kalau sebelah kiri Yang Arif takut Koperal Zafran tembak kena kami punya kereta depan, tersangkut body depan kenderaan kami.

...

Q. 37: En Zul soalan terakhir, En Zul ada di soalan 40, apakah pertimbangan En Zul dalam melepaskan dua tembakan pada kejadian pada ketika ini?

A. 37: *Dalam pertimbangan saya Yang Arif, pada ketika itu masih wujud lagi ancaman di mana semasa saya mendekati motorkar JBS 410 saya masih tidak dapat melihat siapa yang berada di dalam motorkar tersebut. Kerana cermin motorkar tersebut gelap. Tambahan pula secara tiba-tiba motorkar tersebut telah bergerak secara mengejut dan merbahaya ke hadapan. Itu sahaja Yang Arif.*

...

Q. 192: Kamu jangan main-main, ini kamu cakap dia ke hadapan, kamu tak ada cakap dia cuba reverse pun atau himpit, jadi kamu cakap merbahaya ke hadapan ini jawapan kamu?

A. 192: Saya cuma syak sahaja.

Q. 193: Dia pergi kehadapan dan kamu tembak dia?

A. 193: Betul. (Emphasis added.)

[51] It had been elicited in cross-examination that DW5 who was 54 years old at the time of giving evidence had attended many weapons training during his years of service. However, he admitted that the trainings were conducted in a controlled environment, during day time and that he did not attend some of the training sessions that were held about six months to one year annually. He agreed that a moving target was more difficult to aim. He admitted too that it had been some time since he had read the IGSO. The night of the incident was the first time he had to fire a gun. It was determined that he had used a Walther P99 and DW2 was using a sub-machine gun at that time. He did not know

how many rounds of bullets they had discharged. He also agreed that the intention to shoot at the suspect's car was present since he asked for permission to do so from the Bilik Gerakan about 30 minutes before the first shot was fired at Kg Batu 38 (21.3km from where they first sighted the Proton car). He agreed that the road was narrow, bumpy and winding. But he maintained that the Proton Saga at first had tried to force the MPV off the narrow road and was driven fast despite agreeing about the poor road condition. DW5 also agreed the Proton Saga's occupants did not wind down the windows to show them any weapons or throw stones (objects) towards the MPV.

[52] In my assessment of this witness, I found that he had contradicted himself many times and these answers were not re-examined later to clarify his answers. The relevant questions and answers were as follows:

> Q. 119: Tadi En Zul katakan ada beri arahan kepada En Zafran untuk tembak selepas setengah jam mengejar Proton, En Zul ingat tak En Zafran ini melepaskan tembakan?
>
> A. 119: Tidak pasti Yang Arif.
>
> ...
>
> Q. 131: Jadi setuju tidak dengan saya dia tidak boleh bawa lajulah dalam itu cuma MPV tidak boleh potong Proton tadi?
>
> A. 131: Setuju.
>
> Q. 132: Disebabkan jalan tadi hanya muat satu kenderaan sahaja dan tepi dia ada tali air dia kena betul betul jalan atas dia tak boleh zig zag?
>
> A. 132: Betul.
>
> ...
>
> Q. 139: Tidak, sekarang tak boleh tidak pasti, En Zul yang bawa kereta itu saya tidak ada pada hari itu, En Zafran kata takde langsung kenderaan Iain kecuali MPV polis dan Proton betul?
>
> A. 139: Betul.
>
> Q. 140: Maksudnya tiada kenderaan motor lalu betul?
>
> A. 140: Betul.
>
> ...
>
> *Q. 144: Bagaimana En Zul boleh berasa terancam pulak sebab En Zul yang kejar dia bukan dia kejar En Zul?*
>
> *A. 144: Ya pada masa itu kita takut jadi apa-apa sebab kita tak tahu siapa yang ada dalam kereta itu, kalau polis ikut pun dia penjenayah dia ingin melarikan diri jadi kami kejar lah untuk berhentikan dia.* (Emphasis added.)

[53] Similarly, DW2's answers were also self-exculpatory. At the time of giving evidence he was 26 years old. Many of his answers during cross-examination were 'Tidak pasti' leaving the court to ponder whether despite being younger than DW5 he genuinely was unsure about the answers, inobservant or was just being evasive. He had attended weapons training sessions and admitted that the trainings were conducted in a controlled environment, during day time. He agreed that a moving target was more difficult to aim. That night was also the first time he had discharged a firearm. When the sub-machine gun was returned he said he was informed by the investigation officer about ten bullets had been used in the incident.

[54] The court was urged that from his own evidence, the plaintiff was contributorily negligent in his actions which led to him sustaining the said injuries: *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61; *Foong Nan v Sagadevan* [1971] 2 MLJ 24. This evidence in his witness statement marked as PSSP8 was highlighted to the court as follows:

> Q. 10: Kemudian apa yang berlaku?
>
> A. 10: Semasa saya memandu kenderaan, saya lihat melalui cermin sisi dan belakang saya terdapat satu kenderaan polis sedang mengekori rapat. Saya kemudian terperanjat apabila kenderaan polis itu memasang lampu beacon dan membunyikan siren serta menyuruh saya untuk memberhentikan kenderaan. Pada ketika itu, saya enggan berhenti kerana saya tidak mempunyai lesen memandu serta insurans dan cukai jalan bagi kenderaan yang dibawa oleh saya sudah tamat tempoh. Oleh yang demikian, saya tidak memberhentikan kenderaan saya dan berpatah balik menuju ke kampong saya.
>
> Q. 11: Pada ketika itu, bagaimanakah reaksi rakan-rakan kamu yang lain?
>
> A. 11: Rakan-rakan saya terkejut dan takut. Mereka menyuruh saya untuk memberhentikan kenderaan memandangkan polis hanya boleh menyaman saya kerana tldak mempunyal lesen kereta serta insuran dan cukai jalan yang sudah luput. Saya kemudiannya memperlahankan kenderaan saya. Namun begitu, apabila saya memperlahankan kenderaan, polis yang mengekori kami telah melepaskan beberapa das tembakan ke arah kenderaan saya.

[55] The court was referred to the case of *Mahmood v Government of Malaysia & Anor* [1974] 1 MLJ 103; [1973] 1 LNS 86 which discussed s 15(2) of the Criminal Procedure Code that stated:

> If such persons forcibly resists the endeavor to arrest him or attempts to evade the arrest such officer or other person may use all means necessary to effect arrest.

[56] Meanwhile, s 20 of the Police Act 1967 (Act 344) provides that:

> 20(1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful

directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.

[57] Earlier, the IGSO on handling firearms was tendered through PW6 as P12. The court was told that this was a restricted document (*terhad*) but PW6 was candid that the IGSO had been referred to in some of the previous cases such as *Nor Azura*'s case. The relevant provisions are items 3 and 4 (p 3 of P12) and the gist of the provisions are that:

(a) No 3 — Penggunaan senjatapi oleh pegawai polis
Under any circumstances a police officer may use a firearm for self-defence at a roadblock or while conducting an operation including narcotic department, criminal investigations department etc. where it was determined that his life or others' or a property being under his control was at stake ie anticipated death or grievous injury.

(b) No 4 — Tindakan mestilah munasabah
A police officer may take all reasonable measures under the abovementioned circumstances provided that it is believed that the officer could not apprehend the suspect alive without risk of death of grievous injury to himself or others, even if death of the suspect is the result of such measures.

(c) No 5 — Hak mempertahankan diri sendiri
Everyone has the right to defend himself provided the act to defend oneself ends when the perceived threat of death or injury no longer subsisted.

[58] The defendants argued that all the actions of the first and second defendants were reasonable and justified even when they discharged their weapons in the circumstances of the case. They had followed the proper procedures and the law to stop the plaintiff's vehicle in order to conduct an investigation and that they had given reasonable warnings and taken reasonable measures before discharging their weapons. Moreover, they had applied reasonable and proportionate force in the process. Therefore, there was no elements of negligence on the part of both policemen as alleged by the plaintiff. The defendants reasoned that this was because no shots were fired at the windows or windshields of the car and that both policemen were never charged in court for any offence.

[59] It was also the defendants contention that the principle of 'volenti non fit injuria' was applicable in this case due to the plaintiff's own contributory negligence and place himself at risk by his actions: *Lee Geok Theng v Ngee Tai Hoo & Anor* [2000] 4 MLJ 42; [2000] 1 LNS 220. However, this court found that in the circumstances of this case, the principle did not apply and the alleged action by the plaintiff to force the MPV of the road was not proved by the defendants. The plaintiff's evidence was:

Q.14: Adakah Encik Isma ada cuba untuk bergesel dan/atau melanggar kereta polis tersebut?

A.14: Tidak, saya tidak pernah cuba untuk bergesel atau melanggar kereta polis kerana tidak ada faedahnya saya berbuat demikian. Sebenarnya kereta polis tersebut lah yang cuba bergesel dan menghimpit kenderaan saya. Kemudian tayar kenderaan saya telah ditembak dan menyebabkan tayar pancit. Saya telah memberhentikan kenderaan. Walau bagaimanapun, polis masih menembak ke arah kenderaan saya. Saya menjadi semakin takut. Saya teruskan bergerak walaupun tayar sudah pancit.

[60] The court did find that the plaintiff was partly to blame when the policemen opened fire towards his car. This was because of his action in fleeing upon seeing the MPV. Rightly, he had pleaded guilty to a charge under s 186 of the Penal Code for obstructing a public servant in the discharge of his functions and fined RM3,000 in default of seven months' imprisonment. He may well have placed himself and his passengers into a perilous situation in evading arrest and at the same time creating a reasonable suspicion by his response to the police actions. But does that mean that the firing of the weapons by the first and second defendants which caused permanent damage to the plaintiff's left parietal lobe was justified? The court was urged to apply the principle in the case of *Ramachandran a/l Mayandy v Abdul Rahman bin Ambok Laongan & Anor* [1997] 4 MLJ 237; [1996] 1 LNS 109 where the court held:

On contributory negligence as pleaded by both the defendants, it is abundantly clear from the evidence that the plaintiff did not take sufficient care for his own personal safety. He was solely negligent and was responsible for his own mishap. If at all there was contributory negligence, I venture to say that there was ample evidence against the plaintiff ...

[61] Nevertheless, the Court of Appeal in the case of *Nor Azura* in affirming the decision of the High Court which found the defendants liable for the death of the victims, *held that contributory negligence is not a defence that can be raised by the police.* The brief facts of that case was similar to the present case:

In the course of a car chase, police personnel ('the first defendant') fired gunshots to the car driven by one Aminulrasyid ('the deceased'), then of 14 years of age, causing the deceased to die of a gunshot wound. At the High Court, plaintiff's', claimed against the: (i) first defendant for assault and battery and alternatively, negligence and public misfeasance; and (ii) the second to fifth defendants for being vicariously liable for the acts of the first defendant. ... Hence, the present appeals by the first defendant and the second to fifth defendants ...

...

The first defendant submitted that: (i) there was no evidence to show that the first defendant discharged the fatal shots and even if there was, his conduct was justified and reasonable; (ii) the deceased was contributorily negligent in that he failed to stop the car as instructed and sped to evade arrest and therefore, the police personnel suspected the deceased of being a criminal as the car was driven in an aggressive and

dangerous manner; (iii) the claim of misfeasance in public office against the third defendant was unfounded as the three ingredients of the tort were not pleaded; and (iv) the HCJ erred in awarding aggravated or exemplary damages on the ground that the third defendant's press statement about the deceased was malicious.

The plaintiff's argued that: (i) it was the first defendant who fired the gunshots and there was no justification for him to do so as the Inspector General Standing Orders and s 15(3) of the Criminal Procedure Code clearly provides that shots could not be fired unless the police officer finds himself in a situation where he is under attack and he believes that his life is in danger or under threat of grievous injury. Evidence showed that, at the time the fatal shot was fired, the deceased posed no threat to the police personnel; (ii) contributory negligence was not a defence in cases of assault and battery; (iii) all necessary facts have been proved to satisfy the three ingredients of the tort of misfeasance in public office; and (iv) RM150,000 was a fair and reasonable amount for damages for pain and suffering.

Held: (1) There was no evidence that there were other road users in Jalan Tarian 11/2 at the material time. Jalan Tarian 11/2 was a housing area and the area was empty and quiet as, when the shooting took place, it was the early hours of the morning. Based on evidence, the deceased was driving his car away from the police when the first defendant fired the fatal shot. Furthermore, by the time the deceased's car arrived at the housing area of Jalan Tarian 11 1/2, the car tyres were already punctured. More significantly, the first defendant admitted under cross-examination that the deceased posed no danger at the time he fired the fatal shot.

(2) When the first defendant fired his weapon, the weapon was set on auto mode instead of manual mode. *Consequently, 21 bullets were discharged in the direction of the deceased's car. The fact that the first defendant fired the fatal shot was undisputed. He admitted that his patrol car was behind the deceased's car and was pursuing it when the shots were fired. The first defendant further admitted that it was wrong for him to have done that. This was a patent instance of negligence on the part of the first defendant. On the totality of the evidence, the action of the first defendant in firing the fatal shot which resulted in the death of the deceased was clearly unwarranted, unreasonable and unjustified. The defendant's argument of contributory negligence was not a defence. However, the plaintiff's failed to prove the tort of misfeasance in public office.* (Emphasis added.)

[62] In regard to *Shapiei bin Zainal Abidin (No 2)*, the judgment of the learned High Court judge mentioned about the plaintiffs' appeals to the Court of Appeal after the judicial commissioner (as she then was) dismissed the plaintiffs' claim in *Shapiei bin Zainal Abidin (No 1)*.

[13] Pada 1 September 2016 Mahkamah Rayuan telah membenarkan rayuan plaintif-plaintif dan memutuskan defendan-defendan bertanggungjawab ke atas kematian si mati-si mati. Mahkamah Rayuan membuat perintah supaya kes dikembalikan ke Mahkamah Tinggi untuk taksiran ganti rugi dijalankan oleh Pendaftar.

...

[50] Apa yang pasti adalah Mahkamah Rayuan telah mengenepikan dapatan liabiliti oleh Mahkamah Tinggi dan dengan itu memutuskan defendan-defendan cuai dalam menjalankan tugas mereka dengan melepaskan tembakan ke atas si mati-si mati yang mengakibatkan maut ke atas si mati-si mati.

[63] Lastly, in *Nurasmira*'s case the Court of Appeal allowed the appeal by the plaintiffs, and the brief facts were as follows:

The appellants appealed against the decision of the High Court judge in refusing damages for loss of dependency, exemplary and aggravated damages for the death of the father as a result of having been shot by the police. The third defendant in the High Court and the head of the police team who were at the material time patrolling saw two cars travelling together and the deceased was in the car. The two vehicles were stopped and DW1 went to the car and identified himself as a police officer and at the same time heard DW2 screaming Tuan dia tembak'. DW1 immediately directed to open fire. The deceased and three others in the car were killed. The defendants did not dispute the killing but submitted that it was done in defence and relied on s 24(1)(b) of the Police Act 1967 ('the Act'). However, the judge had not dealt with whether s 24 of the Act entitled the police to use excess force and/or kill and no other provision was relied on by the defendants to say that the police force had power to assassinate suspected criminals, taking into consideration art 5 of the Federal Constitution. On the issue of quantum as to dependency claim relating to the deceased's children aged 15, 8 and 7 respectively, the plaintiff's claimed a sum of RM1,000 per month. The defendants argued that it should not be allowed as earnings was not proved and further averred that a sum of RM500 per month would be more of a reasonable figure if the court was minded to award.

[64] One of the issues in that case was in respect of s 24 of the Police Act 1967 that was argued to be applicable that the police were acting in self-defence. Section 24 provides:

24(1) Any police officer may —

(a) stop and detain any person—

(i) whom he sees doing any act or who is in possession of anything; or

(ii) whom he has reasonable grounds for suspecting is doing any act oris in possession of anything,

for which a licence, permit or authority is required under any law in force, for the purpose of requiring such person to produce such licence, permit or authority.

(b) stop and search without warrant any vehicle or vessel which he has reasonable grounds for suspecting is being used in the commission of any offence against any law in force.

[65] However, the Court of Appeal held that s 24 was inapplicable since the provision was not about self-defence. In the present case, the SFC did not rely

on s 24 but on self-defence in general and on ss 3(3) and 20(3)(a) of the Police Act 1967 as set out earlier where it was submitted that there was no breach of statutory duty by the defendants. The provision of s 3(3) reads:

> The Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.

[66] Even then, when it comes to maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime etc as envisaged in the Police Act 1967, the force (police) owe a duty of care towards the public: *Hill v Chief Constable of West Yorkshire Police*. In the case of *Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal* [2014] 2 MLJ 49; [2014] 1 CLJ 316, the Court of Appeal held:

> [20] An action under the tort of negligence involves establishing the following elements:
>
> (i) a duty of care owed by the defendant to the plaintiff;
>
> (ii) a breach of that duty by the defendant;
>
> (iii) the breach caused the damage; and
>
> (iv) the damage is a foreseeable and not a too remote consequence.

[67] The plaintiff urged the court to consider that based on the evidence adduced, alternatively he had made out a case of negligence against the defendants. it was submitted that the shots that injured the plaintiff were from the acts of the second defendant because when the earlier shots were fired at Kg Batu 38 and Jalan Besar Alor Pongsu, the Proton Saga was still moving. But upon the last two shots fired by the second defendant, the car skidded and hit the tree where it then came to a stop. It was the plaintiff's contention that the bullet which strayed and penetrated the car's rear windshield (Photograph No 35) had disintegrated and lodged in the plaintiff's brain.

[68] The plaintiff's evidence in cross-examination was that his car was only slightly faster than the MPV because the police vehicle was gaining on him and drew alongside the Proton Saga to force him off the road. That was why he had to accelerate in order to make a U-turn so that his car would not be hit by the police car.

> Q.599: Boleh kuat sikit Yang Arif tak faham?

A.599: Kereta saya cuma lebih sikit daripada polis tu sebab dia dah himpit makin lama makin dekat. Lepas itu dia dah himpit saya makin dekat ni, saya brek bagi dia terlajak saya pun boleh u-turn balik. Kalau saya ikut dia mungkin kereta saya dalam parit la.

[69] He was challenged that his police report did not mention the word *menghimpit*. The plaintiff explained that when he made the report he narrated to the policeman at the station about the whole incident. But the report became too long and the policeman could have left some parts out. The plaintiff was also asked why he did not return to his house immediately. He replied 'Sebab tayar saya dah penuh tanah dah masa itu kalau saya brek jugak mungkin terjun dalam parit tu'. Then he was asked:

Q.612: Peguam kerajaan ada cadangkan kamu pandu laju, kamu setuju dan apa kamu faham tentang laju itu?

A.612: Jalan kampung saya tak bawa laju.

Q.613: Maksud saya hari itu peguam kerajaan kata kamu pandu laju, jawapan kamu ya saya setuju, apa yang kamu faham tentang kamu setuju kamu pandu laju itu maksud kamu apa yang kamu faham?

A.613: Mula tu saya laju sebab saya nak bagi dia potong saya.

Q.614: Masa dekat atas jalan mana?

A.614: Atas jalan besar tu, sebab jalan kecik dia tak boleh nak potong lagipun jalan itu laluan tu saya tahu sebab jalan itu tak sama. Saya tak laju dia pun tak boleh laju.

...

Q.623: Kamu setuju dengan cadangan peguam bahawa selepas tayar kereta kamu kena tembak, kamu pecut laju, kamu tak setuju, kenapa kamu tak setuju?

A.623: Sebab kereta saya tak boleh nak pandu laju sebab tayar dah pecah.

Q.624: Atas jalan itu berapa boleh bawak laju kalau tayar tak pecah?

A.624: 50 je macam tu sebab jalan tu teruk sikit.

...

Q.628: Kamu setuju bahawa sepanjang polis ekori kamu kereta polis ini sentiasa ada dekat belakang, kenapa dorang tak potong?

A.628: Sebab jalan tu kecik memang tak lepas. Motor pun kalau nak lalu kereta kena rapat dengan tepi rumput, motor pun kena rapat tepi rumput kalau tidak sangkut side mirror motor jatuh.

...

Q.630: Bagaimana keadaan jalan sepanjang jalan kampung itu?

A.630: Memang teruk la.

Q.631: Maksud teruk itu macam mana?

A.631: Berlubang-lubang sebab nama jalan pun jalan kampung, lori sawit semua keluar ikut situ. Jalan itu dah rosak.

[70] The court found that the plaintiff's evidence in this regard was more probable than the first and second defendants' version. There was nothing inherently improbable about his explanation and he admitted he drove fast while they were on the main road which was wider. In regard to the issue of whether the force used upon the plaintiff was excessive, the court found that since the rear tyre of the Proton Saga had been punctured by the shots fired earlier and the car had stopped (the first time), the perceived threat had ended and it was no longer reasonable for the policemen to continue firing the shots towards the car. *The uncontroverted evidence was that the Proton Saga was moving away from the first and second defendants after it momentarily stopped the first time. Never was there any evidence that the plaintiff had tried to reverse and ram into the MPV and/or the two policemen.* All the time the MPV was behind the Proton Saga and the court could not see what was the perceived threat given their positions throughout the hot pursuit. I would agree with the plaintiff's submission that the discretion was not reasonably used by the first and second defendants, particularly when the second defendant admitted that even as early as when the pursuit started, he had already formed an intention to shoot the Proton Saga and asked for permission from the Bilik Gerakan to do so. However, there was no evidence at all offered to the court about what transpired at the Bilik Gerakan when this request came repeatedly from the MPV.

[71] Moreover, the negligence of the policemen could be seen from the two strayed bullets that were described by DW3. Most of the 14 gunshots traced were located at the bottom part of the car and the tyres except for these two which had travelled above the level of the windshields and could be seen even on the ceiling of the car interior and the visor above the driver seat. The court opined that the first and second defendants were personally negligent in discharging their firearms given the physical conditions of the road and the surrounding area, and the positions of both cars in relation to each other.

[72] The court relied on the case of *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717, where the Court of Appeal held:

> [35] In essence, s 5 provides for the vicarious liability of the government for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as the vicarious liability of a private principal for his agent.
>
> [36] Section 6 expressly prohibits the bringing of any proceedings against the government for damages under s 5 unless the action for such wrongful act, neglect or default would have lain against the officer personally. This is a substantive

provision that goes to the jurisdiction of the court. Liability can only be attributed to the government where the officer's act, neglect or default is proved to have established the liability of the officer personally. In the absence of the officer's liability, (which can only arise and bind the officers) if and when the officer or officers are cited as defendants), no proceedings shall lie against the government. Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto.

[73] The court is mindful that in order to succeed in an action for breach of statutory duty under ss 3(3) and 20(3) of the Police Act 1967, the plaintiff must prove the elements as set out in the case of *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440 where Lim Beng Choon J stated that '... It has been said that to establish civil liability for a breach of statutory duty the plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute; (b) the statutory duty imposes a liability to civil action; (c) the statutory duty was not fulfilled; and (d) the breach of duty has caused his injury ...'. Merely setting out the sections of the Act did not mean they had sufficiently pleaded breach of statutory duty: *Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137.

[74] In the present case, the first and second defendants were carrying out the official duties entrusted to them. *However, the court found them to be negligent personally when they did not exercise caro in tho discharge of their duties.* It is all about making the 'right' choice by the police personnel, a decision in that material time that binds the Government as an employer of the personnel. it is common knowledge and could have been easily anticipated by trained police personnel that shooting towards members of the public from a moving vehicle with the kind of road condition they encountered that night was a recipe for disaster. *The court did not find that the plaintiff has proved a case of asssault and battery. Instead, based on the facts of the case, the court found that the plaintiff had proved on a balance of probabilities that the defendants were liable for negligence when the elements of negligence had been proved;* namely: (i) a duty of care was owed by the defendants to the plaintiff; (ii) there was a breach of duty by the defendants; (iii) the breach caused the damage; and (iv) the damage is a foreseeable and not a too remote consequence. Therefore, the third, fourth, fifth and sixth defendants were also to be held liable vicariously for the acts of the two policemen.

[75] The other submission by the SFC was in regard to misfeasance in public office. But the tort of misfeasance was not really pursued by the plaintiff in his submission and the evidence lead was more on assault and battery and/or negligence of the defendants. The court did not find misfeasance in public office as was stated in the case of *Asia Pacific Land Bhd* where it is necessary to prove: (1) malice; (2) knowledge of the unlawful nature of the action; and (3) foresight of injury to the plaintiff ...'. The plaintiff never pleaded malice

and the knowledge that discharging the firearm at the material time was wrongful in law. The gunshots were only to stop the Proton Saga as mainly the traces of shotswere located on the bottom part of the car and rear tyre(s).

[76] The court found that the facts of *Nor Azura*'s case (except for the resulting death of the victim) were similar to the present case and the principles therein are applicable to resolve the question of the 'defendants' liability. At the risk of repeating itself, the court opined that despite admitting he accelerated to avoid arrest, the plaintiff's actions that night ie the manner of his driving, did not place the first and second defendants in danger, instead the plaintiff was the one being pursued by the MPV It was undisputed the first shot was fired after about 21.3km of pursuit within a period of 30 minutes and the rough road conditions, but the second defendant could not overtake the plaintiff's car because of the narrow road and not because he was speeding. The plaintiff claimed that the MPV tried to force his car off and he might have ended in the drain. Moreover, there was no evidence at all that the plaintiff or the other occupants in the car had shot at or threw objects the police at them while being pursued. The perceived threat was due to the first and second defendants being unfamiliar with the place.

[77] However, the conduct of the first and second defendants in pursuing the plaintiff's car and later, opening fire towards the car gave rise to a duty of care to the plaintiff: *Hill v Chief Constable of West Yorkshire Police*; *Nor Azura Hamzah*. At the point of time when the rear tyre of the Proton had been punctured after being shot at and it slowed down, there was no longer the necessity to pursue the car. But instead the evidence was that the first and second defendants continued to shoot at it from the back. The court opined that they may have been overzealous in their attempts to capture the plaintiff and in that process, had used excessive force as can be seen from the no of gunshot traces found in the car. Additionally, the injuries suffered by the plaintiff was not remote, it was a forseeable damage. *Therefore the court concluded that the strayed bullet(s) fragments were the most probable cause of the residual brain damage at the left parietal lobe of the plaintiff's brain with a small metallic foreign body lodged in the area of the brain. This was attributed to the negligent acts of the first and second defendants after the tyre was punctured and the car had stopped.* Pursuant thereto, in line with ss 5 and 6 of the Government Proceedings Act 1956 and applicable case laws, the third, fourth, fifth and sixth defendants were also to be held liable vicariously for the acts of the two policemen: *Government of the State of Sabah v Syarikat Raspand*.

QUANTUM OF DAMAGES

[78] The second issue for the court's determination was whether the plaintiff was entitled to the damages pleaded. Since the court has concluded that the

defendants were liable to the plaintiff for the injuries he sustained from the gunshots fired, the court will consider the damages that he would be entitled. Naturally, the defendants submitted that as their actions were reasonable and justified, the plaintiff was not so entitled and that he was misconceived in law in pleading for general, special, aggravated and/or exemplary damages.

[79] Before proceeding further to ascertain the damages, it would be best here to re-cap the medical evidence on the injuries of the plaintiff. PW11 in his report stated that it was a 'Moderate Head Injury Secondary to Gunshot Wound' based on the plaintiff's condition when he arrived Hospital Taiping on 10 November 2016 when the GCS reading was full. He stated that the patient had recovered well post-operatively but it was not a full recovery *penyembuhan memuaskan, bukan sempurna* because the CT scan showed that the residual foreign body was still present in the brain.

[80] PW9 confirmed there was a residual brain damage at the left parietal lobe of the brain with a small metallic foreign body lodged in the area of the brain that was damaged. This CT scan finding was consistent with gunshot wound. PW9 confirmed that there was definitely brain damage of the left parietal lobe. He told the court that during the surgery done in HRPB Ipoh, most of the foreign body had been removed but what was left behind was a tiny spec of metallic body from the gun embedded in the brain. The metallic body should be left there because it was difficult to find due to the tiny size. It would entail more invasive surgery and he said ... you must cut the brain here and there and will cause more damage. So usually we don't touch it anymore.

[81] PW9 then explained that although the Hospital Taiping report ('P33') concluded 'moderate head injury, *I put there as severe because the brain damage is severe so in fact.* Puan, yang ini kita ada kecederaan otak, kita bahagikan mild moderate and severe three stages. Severe sebab ikut finding CT scan dan weakness selepas dua tahun masih weak. I think can classify as severe ...'. In cross-examination he also disagreed that the right-side weakness happened earlier than the gunshot incident because PW9's also mentioned it. Prior to that there was no mention of weakness in the patient's history. This was PW9's medical opinion on the chances for recovery:

> Q.30: Doctor is there any possibility for the lower and upper limb to back to normal?
>
> A.30: Your Honor I think I put there as permanent meaning that is unlikely, very, very unlikely to be normal again because there was definitely brain damage and the weakness has been there for more than two years by the time I saw him. Your Honor, the brain recovery usually we expect within the first one year or second year the most within the first two years. Beyond that we don't think there be any significant recovery.

A ...

Q.91: Setuju saya katakan doktor, Plaintif right simple partial seizure hanya sekali sahaja dalam tempoh 13/11/2016 sehingga 20/01/2017?

A.91: Ikut itu cerita infomasi yang dibekalkan itu satu sekali sahaja. Tapi dalam
B *literature yang brain injury kalau ada metallic foreign body dalam Itu risiko epilepsy masih ada so I give it about 30 percent chance he still can develop anytime.*

Q.92: So with 30 percent itu adalah high risk?

A.92: Yes, quite high.

C

[82] According to PW9, by the time the plaintiff saw him in February 2019, there was no epileptic seizure fit (due to the head trauma) for some time. He found that there was some cognitive dysfunction especially on mental calculation. That meant he could not do simple addition and subtraction. The
D main physical finding was a weakness of the right upper limb and right lower limb where the upper limb weakness was more severe than the lower limb. The risk of the plaintiff suffering epileptic seizure was also quite high at 30% chance because of the presence of the residual foreign metallic body in the brain.

E

[83] In regard to the plaintiff's ability to do simple mathematics, it was implied that as he studied only up to Form 5, that was normal. However, PW2 told the court that the plaintiff stopped schooling when he was in Form 5 because he had to help her care for their family.

F

[84] The evidence offered by the defendants' rehabilitation expert was in respect of recovery from the injuries in respect of attending physiotherapy and this could be seen in the evidence of DW1 (refer to D35 at pp 103–110 of IDB). She saw him on 24 February 2020, a year after PW9. Nevertheless, even
G the good doctor could not guarantee that the plaintiff will recover from his injuries or give an estimate of the percentage of recovery. It was noted by the court that although the weakness was in the upper and lower right limbs, the plaintiff was actually ambidextrous. He was asked in court to write his name on a piece of paper and it was noted he could write almost normally with his left
H hand. He said previously he wrote better with the right hand. After the incident, he had to eat with his left hand as well as do simple work such as collecting loose oil palm fruits. He could not use his right hand as it was weak and he could not bend the fingers. He said he was not left-handed and he learnt to use his left-hand after the injury. In regard to the anti-epileptic medicine, he
I said he was allergic to it as it caused rashes and the doctor stopped the medication.

[85] Based on all the above evidence, the court found that PW9's expert opinion was unchallenged and court has no reason not to accept his evidence

that the injury suffered by the plaintiff to his brain was of a permanent nature and the injury had caused the weakness in the upper and lower right limbs.

Assessment of damages

[86] Before setting out the amount of damages to the plaintiff, it is pertinent to note that the court has largely followed the amount of damages awarded in *Nor Azura*'s case after comparing them with the damages awarded in the other shooting cases, as the facts were almost similar except that there was resulting death in that case. There RM150,000 in general damages was reduced to RM100,000 the RM150,000 damages for misfeasance and RM150,000 for aggravated/exemplary damages were set aside as unproven. Bereavement of RM10,000 and RM4,800 for special damages were also awarded.

[87] The court was referred to the English case of *Donnelly v Joyce* [1973] 3 All ER 475 where it was held:

> [19] The principle for assessing damages for victims of negligence is based on the following. *That the loss of the victim is his needs resulting from the negligence. And that the amount of that loss is ascertained by reference to the proper and reasonable cost of supplying that need. The aim of damages in negligence is to compensate the victim for his loss. That loss is the existence of a need that would not have existed but for the tort.* The computation of that loss in monetary terms for an award of damages is done by reference to the proper and reasonable cost of supplying that need ... (Emphasis added.)

[88] The plaintiff had pleaded the following reliefs from the court:

(a) general damages;

(b) special damages;

(c) damages for actual loss of income at RM2,600 per month;

(d) damages for future loss of income or ability to work;

(e) damages for tort of misfeasance in public office;

(f) aggravated/exemplary damages;

(g) costs;

(h) interests; and

(i) a declaration that the defendants had, wilfully and/or with wrongful intent, breached the plaintiff's fundamental rights as contained in Part II of the Federal Constitution.

[89] The court in considering the assessment of quantum of damages in respect of the injuries sustained by the plaintiff had referred to the plaintiff's

submissions, the 2018 Revised Compendium on Personal Injuries and current trends for similar type of injuries. The defendants did not submit on quantum because they took the stand that the plaintiff was not entitled at all to be compensated for the injuries which he suffered.

GENERAL DAMAGES

[90] The plaintiff submitted that he was entitled to general damages for pain and suffering because he did sustain serious injuries due to the defendants' negligence. He compared his case with the cases of *Nor Azura* and *Shapiei bin Zainal Abidin*, where although the victims died and there was no evidence on pain and suffering prior to death, the High Court and Court of Appeal awarded the amount accordingly. The plaintiff suffered the following serious and permanent injuries:

(1) Ballistic severe head injury secondary to gunshot wound

– Sustained loss of consciousness

– Traumatic cerebral odema and right parietal subgaleal hematoma

– Subarachnoid haemorrhage

– Extradural haemorrhage

– Brain contused, dura torn, brain contaminated with hair and jiggered wound seen

– Multiple bony fragments removed from wound embedded inside contused brain

– Severe permanent brain damage to the left parietal lobe of brain with retained metallic foreign body within the brain

– Acalculia (inability to perform simple calculation) and severe spastic right hemiparesis

– Major neurological deficit of persistent right sided weakness involving the upper limb

– Change in personality and becoming more irritable

– High risk of post-traumatic epilepsy at about 53%

(2) Left parietal bone fracture

(3) Jaggered laceration wound (5 x 4cm) over left temporoparietal region with hole over the skull measuring 1 x 1cm from the nose

(4) Small laceration wound at nose

(5) Cognitive dysfunction especially on mental calculation

[91] PW9 was asked in cross-examination if the plaintiff had attended rehabilitation treatment regularly and properly, his condition would have been better than when he met PW9 in 2019. PW9 replied 'Seperti saya kata kita bagi tempoh sampai dua tahun lepas itu masih lemah masih ada deficit yang deficit itu adalah kekal tahun lepas brain damage kalau dua itu adalah yang normal practice'.

[92] The court asked PW9 to explain his evidence regarding the plaintiff's motor power in the report (P31):

> Q.101: Doctor can you refer to your report para 47, this para mentioning about motor power 2-3/5, 3/5 and 4/5 can you please explain?
>
> A.101: I think I have to explain the motor power is 0-5, 5 is normal, 0 means no movement at all, 1 means a flicker of movement, 2 you can move the arm not against the gravity, 3 you can lift up against gravity, 4 you are weak but you have some power, 5 is normal.
>
> Q.102: In this case? (Mahkamah)
>
> A.102: Some are 2 cannot lift up against gravity, but I put there the finger is 3 but leg is good I put 4 plus.

[93] The plaintiff submitted the case of *John Andrew Maltose v Cyril Steven & Ors* [2015] 7 MLJ 548 in support of his claim for general damages. The brief facts of that case were that the first defendant hitched a ride in the plaintiff's car and shot the latter twice on the left side of his head within close range. The plaintiff survived the attack but suffered serious brain damage RM300,000 and was awarded for general damages. The court was also referred to the case of *Syarizan Sudimin & Ors v Abdul Rahman Bukit & Anor* [2010] 3 CLJ 877 where the plaintiff was attempting to flee the police on his motorcycle. The police kicked the motorcycle and he sustained injuries. The court in awarding RM300,000 in general damages held that:

> (2) A policeman in pursuit owes a duty of care to the suspects he is pursuing. The standard of care on such policeman and in such situations is to exercise such care and skill as is reasonable in all the circumstances. In this case, the act of the first defendant in kicking the first plaintiff's motorcycle who was riding at a fast speed (even though he was attempting to escape police detention for a traffic offence) was most unjustified and unlawful.

[94] For the court's guidance, other cases were referred to in respect of general damages for injuries to the head in motor vehicle accidents as follows:

(a) *Kassim b Ibrahim & Anor v Syed Khodri b Syed Abdul Aziz* [2009] 2 PIR [25]:

> RM350,000 untuk severe head injury which resulted in large subdural hemorrhage, right frontal contusion that caused seizures, cognitive deficits, and deformity as the bone flap was removed;

(b) *Chong Nyan Lai v Abdul Ghani b Othman* [2010] 1 PIR [11]:

RM300,000 for severe head injuries that resulted in neurological disabilities and persistent vegetative state;

(c) *Kalaiarasan a/l T Sukumaran v Khor Lye Choon* [2011] 2 PIR [6]:

RM350000 to the plaintiff for severe head injuries (very severe cerebral concussion (diffuse brain injury) intracelebral hemorrhaged, cerebral oedemaoud brain damage resulting in permanent dysorthria and some impairment of mental functions, permanent weakness of the right side due to right hemiparesis and inability to stand and walk independently.

[95] The plaintiff asked for RM380,000 in general damages taking into consideration permanent brain damage and loss of basic ability to do simple calculations as there was residual foreign metal body embedded in the brain and weakness of the right upper limb. *The court found that the global amount of RM350,000 was justified in this case takig into consideration the above injuries and resultant effect on the plaintiff. This amount did not include the one time seizure suffered while he was under treatment in hospital because the court has not awarded it.*

SPECIAL DAMAGES

[96] Special damages must be proved: *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295. The plaintiff had pleaded for special damages for the total costs of RM2,605 that he had incurred as follows:

(a) Resit pembelian dokumen Repot Polis di mukasurat 72 & 73 Ikatan dokumen bersama berjumlah RM4;

(b) Pembelian Dokumen Laporan Perubatan di mukasurat 75 ikatan dokumen bersama dan Resit daripada Tetuan Azamuddin & Co di mukasurat 4 Ikatan Dokumen Tambahan Plaintif II berjumlah RM200;

(c) Bayaran bagi perkhidmatan perubatan di Hospital Ipoh dan Hospital Taiping berjumlah di mukasurat 74, 76 sehingga 82 Ikatan Dokumen bersama berjumlah RM396;

(d) Perkhidmatan perubatan kesihatan dan pergigian di mukasurat 83 Ikatan Dokumen Bersama berjumlah RM5;

(e) Kos Laporan Pakar Neurology di mukasurat 178 ikatan dokumen bersama bersama Resit daripada Tetuan Azamuddin & Co di mukasurat 5 Ikatan Dokumen Tambahan Plaintif II berjumlah RM2,000.

[97] The plaintiff submitted that although the receipts for travelling to the various hospitals could not be produced, nevertheless, in the case of *Muhammad Shafiq Aiman bin Saad Hassan dan satu lagi v Mohd Fauzan bin Ismail* [2021] MLJU 1488; [2021] 1 LNS 1240 the court held that the court

has a discretion to determine what was a reasonable amount for such expenses. There was evidence that the plaintiff's parent(s) had accompanied him and visited him in the hospitals. There was evidence from the plaintiff that *he did not go for follow-up treatments because he could not afford the expenses* for the journey. The court was urged to give a global and reasonable amount for travelling expenses. *Therefore, special damages that have been allowed were RM2,605 + RM500 for travelling expenses + costs of expert's court attendance at RM9,400,00 = RM12,505.*

DAMAGES FOR LOSS OF INCOME

[98] The court has only made calculations under one category for loss of income to also cover future loss of income due to his inability to do the previous job and contribute financially to the family.

[99] The evidence to support the claim for loss of income came from the plaintiff himself, PW2 (his mother) and PW4 his employer. The plaintiff worked as a general worker collecting oil palm fruits and cleaned up the plantation area. He was paid daily in cash by PW4 and the total monthly pay would come up to RM1,100 to RM1,400 and the payments were only recorded in a small book, Buku Upah marked as P10A and P10B (refer to pp 179–199 of IDB). He had worked for two years prior to the incident. In the case of *Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan* [2016] MLJU 1716; [2016] 3 CLJ 210 the Court of Appeal awarded RM500 as monthly contribution to the family of the deceased although there was no evidence about the deceased's job and income. Despite the cross-examination by the SFC in regard to the Buku 555, the court has no reason not to accept the evidence of PW4. The transactions were recorded in a very basic form such as 'kait buah' 'kait pelepah' and 'racun'. There was also some 'advance' recorded in the small book. After the incident, the plaintiff stated that he earned only RM300 per month helping his grandfather to collect loose oil palm fruits. There was no challenge on this evidence and the medical evidence on the weakness of his right upper limb.

[100] The plaintiff calculated the amount of damages for this category as follows:

Age at time of injury — 22 years

Mean monthly wages — RM1100 + RM1,400 divided by 2 = RM1250 per month

Total loss of income — RM1,250 x 12 months x 16 years = RM240,000

[101] The court has considered that the amount of *RM240,000 is justified*

under the circumstances as a global sum for total loss of income of the plaintiff.

DAMAGES FOR TORT OF MISFEASANCE IN PUBLIC OFFICE

[102] The court did not award this damage because it was not proved.

AGGRAVATED/EXEMPLARY DAMAGES

[103] From the facts, it was submitted that the first and second defendants had the intention to shoot the plaintiff's car from as early as at the start of the hot pursuit. They also shot at the car when it had already stopped, hence there was no such necessity to continue discharging their firearms towards the car, which caused the gunshot injuries to the plaintiff's brain. Hence, the plaintiff sought aggravated and/or exemplary damages for the police actions. Some of the cases referred to by the plaintiff could be distinguished from the facts as there was evidence that the shootings in those other cases were execution style, unlike the present case where the shots were fired to stop the car. The strayed bullets were the foreseeable result of the negligent action in firing upon a moving target in poor road conditions. The court accepted the evidence of both policemen that they went to check on the occupants of the car after it crashed into the tree and they were not intending to execute the suspects: *Nurasmira*'s case. This was also not a case of fake encounter because the plaintiff himself admitted that he tried to flee so he would not be arrested.

[104] The surgery was allegedly done on the second day after the incident because PW2 could not obtain the identity card of the plaintiff much earlier. They had to go back and forth to the IPD in Kerian and Ipoh for the document. The plaintiff submitted that the defendants were indifferent towards PW2's predicament when she could not obtain her son's identity card from the police in order to give her consent for surgery on the plaintiff, and therefore, an award for aggravated damages was in order. The defendants' evidence was that the document could not be given to her earlier because the plaintiff was still under investigation although he was hospitalised. The court accepted this explanation and did not find there was any malice intent in this regard on the part of the defendants. The case of *Hassan Marsom & Ors v Mohd Hady Ya'akop* [2018] 7 CLJ 403 referred to by the plaintiff to support his claim for exemplary damages could be distinguished from the facts. In that case there was a finding of liability for false imprisonment and exacerbated by the unlawful assault of the plaintiff's while in custody. *Hence, aggravated and /or exemplary damages was not justified to be awarded in the present case.*

COSTS

[105] The plaintiff pleaded for costs of action in the amount of RM60,000 based on *Nor Azura*'s case where they were awarded RM50,000 then. *The court*

awarded RM40,000 considering that although the case was filed in 2019, the trial commenced in 2021 and was completed in 2022.

DECLARATION

[106] The plaintiff sought a declaration that the defendants had, wilfully and/or with wrongful intent, breached the plaintiff's fundamental rights as contained in Part II of the Federal Constitution. The court concluded earlier that the defendants were negligent but did not find any element of mala fide in the actions of the first and second defendants. *The plaintiff is not entitled to this remedy.*

[107] A summary of the judgment given on 13 July 2023 with comparison made against the Revised Compendium 2018 is as follows for ease of reference:

No	Particulars of damages claimed	Quantum allowed
1.	General Damages 1. Ballistic severe head injury secondary to gunshot. Note: Not stated in the Revised Compendium. 2. Left parietal bone fracture. Compendium: RM12,000 to RM18,000 3. Jaggered laceration wound 5 x 4cm over left temporoparietal region with hole over the skull measuring 1 x 1cm from the nose. Compendium: RM2,500 to RM9,500 4. Small laceration wound at nose. Compendium: RM2,500 to RM9,500 5. Congnitive dysfunction especially on mental calculation. Intellectual impairment in Compendium: RM60,000 to RM180,000	Global amount awarded RM350,000
2.	Special damages (a) Treatment costs of RM10,000 — Not proved (b) Travelling costs for parents to visit and care for the plaintiff to and Hospital Parit Buntar at RM50 per day x 5 days = RM250	1. Global amount awarded for travelling costs RM500. 2. Documents costs awarded RM2,605. 3. Costs for Consultant Neurosurgeon to attend

	(c) Travelling costs for parents to visit and care for the plaintiff to and fro Hospital Taiping at RM50 per day x 5 days = RM 250 (d) Travelling costs for parents to visit and care for the plaintiff to and from HRPB Ipoh at RM100,00 per day x 10 days = RM1,000 (e) Travelling costs for the plaintiff to and fro Hospital Parit Buntar for follow-up treatment at RM50 per day x 3 days = RM150 (f) Travelling costs for the plaintiff to and fro HRPB ipoh for follow up treatment at RM100,00 per day x 3 days = RM300 (g) Travelling costs for the plaintiff to and fro Hospital Taiping for follow-up treatment at RM50 per day x 5 days = RM250 (h) Travelling costs to Hospital KPJ Ipoh for examination by Consultant Neurosurgeon = RM100 (i) Damages to clothing = RM300 — Not allowed (j) Damages to car — not yet repaired — Not allowed (k) Documents costs RM500 — Allowed RM2,605 (l) Costs for medical report RM 80 — Already included in (k) (m) Costs of Expert report RM2,000 — Already included in (k) (n) Costs for Consultant Neutosurgeon to attend court to give evidence RM9,400 — Allowed RM9,400	court to give evidence allowed RM9,400.
3.	Damages for actual loss of income at RM2,600 per month and continuing RM500 x 12 bulan x 16 = RM96,000 Note: Multiplier — loss of future earnings under s 28A(d)(i) of the Civil Law Act 1956 (d) in assessing damages for loss of future earnings the court shall take into account that —	Not allowed

	(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the no of years' purchase shall be 16.	
4.	Damages for loss of income and inability to work in future RM1,250 x 12 months x 16 years = RM240,000	Awarded RM240,000
5.	Damages for misfeasance in public office	Not allowed
6.	Aggravated and/or exemplary damages	Not allowed
7.	Defendants had, wilfully and/or with wrongful intent, breached the plaintiff's fundamental rights as contained in Part II of the Federal Constitution	Not allowed
	TOTAL	RM602,505

[108] The court also awarded interest as follows:

(a) interest of 5% on general damages from the date of filing of the writ until the date of judgment;

(b) interest of 2.5% on special damages from the date of the incident until the date of judgment; and

(c) interest of 5% on the whole of the judgment sum from 10 November 2016 until full settlement.

CONCLUSION

[109] Pursuant to the above considerations, the court found that the plaintiff had proved his claims on a balance of probabilities and allowed the plaintiff's claims for damages in part with costs of RM40,000.

[110] The quantum of damages ordered in respect of the general and special damages are justified and reasonable in line with the applicable principles and laws.

Order accordingly.

Reported by Ashok Kumar